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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1200

HENRY B. McFARLAND,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAURICE EDELBAUM
Attorney for Petitioner
250 Broadway
New York, New York

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

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October Term, 1966

No.

HENRY B. MCFARLAND,

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—against—

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Henry B. McFarland, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case as recited *infra*.

Opinion Below

The opinion of the Court of Appeals, printed in Appendix 1 hereto *infra*, is not yet reported. The District Court did not render any formal opinion as such.

Jurisdiction

The judgment of the Court of Appeals was entered on January 5, 1967 (Appendix 3 hereto, *infra*). A timely peti-

tion for rehearing, and an accompanying timely petition for rehearing *en banc,* were denied by the Court of Appeals on January 26, 1967. Mr. Justice Harlan, by order, has extended the time for filing this petition for certiorari to and including March 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner, who for many years had been Warden of a County Jail in New Jersey, was convicted of perjury before a Federal Grand Jury in the Southern District of New York. The Grand Jury was investigating alleged Mann Act violations arising from alleged visits by prostitutes to prisoners at the New Jersey jail. As the result of certain failures of proof and certain procedural rulings in petitioner's perjury trial, the case went to the Trial Jury with all Mann Act or prostitution items or charges having been excluded from the trial Jury's consideration. The only perjury charges submitted to the trial Jury were that petitioner had lied to the Grand Jury in answering questions about use of the telephone by prisoners under his charge, and about other privileges such as special food and social visits allegedly extended to prisoners. Thus the only matters submitted to the trial Jury concerned whether petitioner had lied to the Grand Jury about internal housekeeping incidents at the New Jersey jail, none of which were tied in with any of the Mann Act charges in the indictment. The case involves also improper and prejudicial conduct by the trial prosecutor which the Court of Appeals deemed sufficiently serious to warrant the inclusion in its opinion of a reprimand to the Government. The questions are:

1. In view of the elimination from the case, as submitted to the trial Jury, of all Mann Act references except the purely formal continuing allegations of the Grand Jury "purpose" or "materiality", i.e., in view of the fact that the case as submitted to the trial Jury retained only rump character as a "Mann Act perjury" case and thereby stood wholly detached from its original supposed Mann Act Grand Jury character with nothing left in the case except alleged perjury concerning purely internal housekeeping matters at a local jail, was not submission of the case to the trial Jury unjustified as working a subversion of any fair or sensible purpose of the Federal perjury statutes?

2. Does not the hypertechnical and utterly formalistic interpretation of the principles of Federal Grand Jury "materiality" and "competency" needed to justify submission of such a perjury case to a trial Jury, amount to a violation of due process of law?

3. Does not this really extraordinary application of the Federal perjury laws violate substantive and not merely procedural due process, i.e., does not the case become one of violation of substantive due process in that it is substantively unreasonable to allow Federal prosecution and conviction for Grand Jury perjury in a matter so remote from, indeed so totally lacking connection with, any legitimate object of Federal concern?

4. Do not this prosecution and conviction violate even the very subject matter jurisdiction limitations which the Constitution imposes on the power of the United States to punish crimes, inasmuch as the case as submitted to the trial Jury ended up being, literally, nothing more than a case of alleged perjury as to a subject matter which was

in the exclusive jurisdiction of the State of New Jersey under the distribution of powers in the Federal-State system?

5. Simply from the standpoint, furthermore, of rational administration of the trial jury system, was it not prejudicial error in terms of fair due process trial to submit for any trial jury's consideration the abstract vestiges of this "perjury" case, when neither charges nor proofs remained in the case from which a trial jury could rationally and justly deduce a verdict of conviction under this Mann Act perjury indictment?

6. When, as here, an initially ostensible subject matter of Federal Grand Jury "competence" or "materiality" washes out, during the subsequent perjury trial, into an empty abstraction, does not the case take on the character of outright "failure to charge an offense", i.e., when the indictment is considered (as it must be) in the truncatedly excised form in which it was here submitted for the Jury's final consideration?

7. Indeed further, having in view all of the foregoing, has it not resulted in this case that petitioner has been convicted for an offense not charged at all in the indictment, i.e., the alleged offense of having falsely denied to a Federal Grand Jury that he accepted payment for non-Federally cognizable "housekeeping" favors to prisoners in a local or State prison institution governed by State law?

8. Insofar as this perjury prosecution has depended also on alleged "materiality" of a Federal Grand Jury subject matter said to arise under the Federal Communications Act, i.e., insofar as the case involves or initially involved

(prior to the elimination of all Mann Act aspects) alleged use of telephones in aid of Mann Act prohibited prostitution activities, has not petitioner been unconstitutionally prosecuted and convicted in that there does not actually exist any Federal "crime" of violating the Federal Communications Act by using or permitting the use of telephones to violate the Mann Act; and does not the view adopted in recent years by some of the lower Federal Courts that one can "violate" the Federal Communications Act by "illegal" use of the telephone (as for gambling, prostitution, narcotics violations etc.), rest upon an uncritical and demonstrably erroneous set of assumptions which have no basis in legislation and which could not constitutionally be read into the Federal Communications Act because any such supposedly proscribed "illegalities" in use of telephones are derivable, if at all, only from "tariffs" filed with the Federal Communications Commission by private telephone companies, so that the Federal "crime" of "illegal" telephone use exists only by virtue of "legislation" by private persons (the telephone companies), whose filed "tariffs" moreover do not even effectively come to the knowledge or attention of prospective "defendants"—which last raises also the due process question of adequate notice or apprisal to persons who may become subject to charges of Federal "crime" without ever having had, realistically or practically speaking, any knowledge or warning of the existence of a Federal "law" forbidding such "criminal" conduct?

9. Was petitioner denied a fair trial and due process of law by the conduct of the prosecutor in having called to the stand a female witness who was to give exceedingly inflammatory testimony against petitioner, and who to the

knowledge of the prosecutor had a recent history of severe psychological disturbance, the prosecutor not disclosing these psychiatric facts concerning the witness until after her direct testimony had become a fait accompli lodged upon the record, and the prosecutor even then having continued to try to conceal from the defense these psychiatric facts, i.e., even after the witness had completed her direct testimony and the defense was preparing to cross-examine her?

10. Do not the combined points raised in the above questions call for this Court's intercession by certiorari in the interests of the fair administration of Federal criminal justice?

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment due process clause. It also involves 18 U.S.C. § 1621 (perjury), and 47 U.S.C. §§ 201(b), 203, 409(1) and 501 (Federal Communications Act). These latter statutes are quoted in Appendix 5 hereto, *infra*. The case also involves 18 U.S.C. §§ 2421 and 2422 (white slave traffic), but these latter provisions have no direct bearing on any issue raised in this petition and we therefore do not quote them.

Statement of the Case

1. Introductory

Petitioner Henry B. McFarland was convicted in the United States District Court for the Southern District of New York (Croake, D.J.), after a jury trial, on two counts of perjury allegedly committed before a Grand Jury (18

U.S.C. § 1621), and he was sentenced to six months on one count (Count Two) and one year and six months and a fine of $1,000 on the other count (Count Three), the execution of the prison sentence on the latter count being suspended and petitioner being placed on unsupervised probation for the period of that sentence to begin upon the expiration of the six month sentence imposed on the former count (67a*). The within perjury indictment originally contained four counts, but Counts One and Four were dismissed as a matter of law by the Trial Court (Tr. 1339-1343, 1372-1376, 1757-1760)—details as to this striking of counts of the indictment, a matter of prime importance in the case, are presented *infra*. Petitioner is free on bail of $1,000 pending this certiorari application, and payment of the fine above mentioned is stayed pending the within proceedings.

On appeal to the United States Court of Appeals for the Second Circuit, the judgment of conviction was affirmed (details *infra*).

Petitioner McFarland, a man seventy-two years of age who has spent his entire adult life as a law enforcement officer in Hudson County, New Jersey, became involved in this perjury prosecution as the result of testimony which

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* " a" refers to the printed Appellant's Appendix in the Court of Appeals. Nine extra copies of that printed Appendix, and of the printed Appendix For The United States Of America in the Court below, are filed herewith. The appellant's printed appendix in the Court below did not include any trial testimony, and the Government's printed appendix included only certain short portions of the trial proceedings. References to items in the trial transcript which are not contained in the printed appendices will appear herein as "Tr. " or, as the case may be, as "R. "(when referring to portions of the record on appeal in the Court below other than the trial transcript as docketed in that Court). Our filing herein of the record in the Court below includes the trial record.

he gave before a New York Southern District Grand Jury investigating alleged visits by prostitutes to inmates of the Hudson County Jail of which Mr. McFarland was the warden since 1951. As we shall show, the central fact which emerges from this trial record is that all charges and proofs relating to Mann Act activities or indeed relating to any alleged improprieties or even questionable happenings involving females at the Hudson County Jail, became eliminated from the case, under rulings of law by the Trial Judge before submission of the case to the Jury—hence the dismissal of Counts One and Four and the elimination of references to females in Count Three (details *infra*). The case *as it went to the Jury*—under the remaining counts of the indictment, Counts Two and Three—in effect involved only alleged perjurious Grand Jury testimony by Warden McFarland concerning his alleged personal participation in (1) allowing Hudson County Jail inmates to use the telephone,* and (2) allowing such inmates certain special privileges of quartering, food facilities, visiting and the like.**

As to aspects of the indictment involving alleged violations of the Federal Communications Act by reason of the telephone-use above mentioned—which the Government contended had a bearing on the Mann Act charges—we expect to demonstrate in this petition that as a matter of law no Grand Jury inquiry concerning such telephone use *even if such was connotative of Mann Act activities* (which we deny) was "competent" within the meaning of the perjury statute (18 U.S.C. §1621) because the pattern in recent

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* Again, no prostitution or otherwise improper aspects in relation to females being involved in any such telephoning.

** Again, no prostitution or relatedly improper activities were involved in this last.

years of this kind of "telephone" investigation by Federal prosecutors and Grand Juries proves to be, upon analysis of the applicable legislative and administrative provisions, absolutely and literally *ultra vires*, there being no valid legal foundation for Federal criminal investigation or prosecution in this area of use of telephones for allegedly "illegal" activities. In short we expect to show in this petition that, by reason of the elimination from the case of the alleged Mann Act subject matter and by reason of the inapplicability of the Federal Communications Act subject matter as a matter of law, the grounds for finding Grand Jury "materiality"—or indeed statutory "competency" under 18 U.S.C. §1621—in the allegedly perjurious testimony of the petitioner concerning telephones and other special jail privileges of a non-prostitution-connected type are insufficient to sustain the within charges of perjury.

2. The Indictment, and the Items in the Indictment Which the Trial Court Eliminated from the Jury's Consideration

Prime importance attaches in this case to the excisions from the indictment (6a) which the Trial Court determined must be made in submitting the case to the Jury. For a full understanding of the importance of these excisions, it is of course necessary to have some details of the trial testimony, which we treat under a later subheading in this statement of the case. It is convenient, however, to have a complete comparison of the original text of the indictment *vis a vis* the text of the indictment in the form in which it was submitted to the Jury, and in Appendix 4 hereto *infra* we print such a comparative text, in which we set forth the original provisions of the indictment in their entirety with suitable markings, by italicized type, to show

at a glance what was excised by the Trial Court. It will be noted in that partially italicized text of the indictment which appears in Appendix 4 hereto *infra* that the charging parts of Count One (commencing with par. 4 of that count) and all of Count Four are completely stricken out (italicized). It will be noted also that substantial portions of Counts Two and Three were stricken out by the Trial Court.

The indictment as it came from the Grand Jury was, of course, oriented dispositively towards the allegations relating to visits by prostitutes at the Hudson County Jail (Mann Act), with which were connected (likewise dispositively in point of Grand Jury purpose) the allegations as to use of telephones at the jail (Federal Communications Act). By the Trial Court's elimination of Counts One and Four plus its excisions from Counts Two and Three,* there were eliminated from the indictment all Mann Act allegations, and in fact there were eliminated all references to visits by females with the single exception of one group of questions and answers recited in Count Three;** this last mentioned item in Count Three concerning females stands, in the excised version of the indictment, in a setting which has no relation to Mann Act charges or any sexual improprieties whatever. In short, what remained in the indictment after the dismissals and excisions by the Court, con-

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* The excisions from Counts Two and Three consisted *inter alia*, of the respective paragraphs in each of those counts in which the Grand Jury had repeated and re-alleged the first three paragraphs of Count One, which the Court dismissed in its entirety.

** Indeed, there is a serious question as to whether the failure to eliminate the item just mentioned was an inadvertence, i.e., whether the Trial Court had intended also to eliminate the latter sole reference to visits by females (Count Three) (Tr. 1761-1774, 1779-1784).

sisted solely of allegations that the defendant had permitted prison inmates to have special telephone privileges and other special privileges (not connected with prostitution or sex), that he had done this for money, and that he had falsely denied doing so in his testimony before the Grand Jury.* Indeed further, as the result of the Court's accompanying orders or rulings for the striking of testimony of various Government witnesses for failure to satisfy the "two witness" rule in perjury or because necessitated by excisions from the indictment dictated by other considerations (*infra*), the record establishes still more positively that the case as submitted to the Jury stood divested of any Mann Act allegations or connotations whatever, and that it consisted solely of the telephone items and the other special privilege items just mentioned—which, again, stood on the record as having no remaining connection with prostitution or Mann Act charges.

3. The Trial Testimony, and the Items Stricken Therefrom or Excluded From the Jury's Consideration

The following summary of the trial testimony covers each trial witness, in capsule form, which we believe is sufficient for the purposes of this petition; in the case of the witness Ruth Karsh, a more extensive description is needed and will be given in another connection *infra*.

Trainor, a prisoner at the Hudson County Jail (Tr. 17 et seq.) testified of a visit with his wife in the counsel room of the jail (no sexual relations alleged), food brought from

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* The Trial Court's rulings as to dismissals or excisions affecting the indictment appear at Tr. 1305-1307, 1334-1343, 1361 et seq., 1376-1377, 1761-1774, 1779-1784, 1787-1789; and see 22a-26a.

outside, and small payments to the defendant; an item related to liquor at the jail was stricken (31a; Tr. 18, 49, 52-54, 58-61, 107, 1787-1789). Mrs. *Taccetta* testified about private visits with a prisoner and small payments to the defendant, no sexual improprieties being alleged (31a; Tr. 110, 116-126, 141, 143-146, 166-168, 170). *Walendzinski* testified about obtaining more comfortable quarters for his young son at the prison and small payments to the defendant (no sexual connotations) (32a-33a; Tr. 171, 174). *Ross,* a prisoner at the jail, testified about visits from his wife, transfer to better quarters, telephone use, food received from outside, and small payments to defendant (no sexual connotations) (33a-35a; Tr. 222, 241-245, 267-271, 319-320, 323, 353, 361). Mr. and Mrs. *Schwartzer* testified about Ross' comfortable quarters and telephone use; a financial topic in their testimony was stricken (35a, 39a; Tr. 371 et seq., 619 et seq., 1321-1326). *Viola* testified about being patronized by another prisoner (Konigsberg), comfortable quarters, telephone use, and visits from his girl friend (Cisek); all Mann Act items in Viola's testimony were stricken (35a-38a; Tr. 386, 400, 408 et seq., 513-517, 1343-1344, 1377, 1759-1774, 1779-1784, 1787-1789). Miss *Cisek* testified about visits to Viola in private quarters and telephone calls (no sexual connotations) (38a; Tr. 518 et seq.). Miss *Karsh* testified about visits to a prisoner in the counsel room and payments to the defendant; all sexual or Mann Act items in her testimony were stricken or otherwise withdrawn from the Jury's consideration (38a-39a; Tr. 527 et seq., 1758, 1761-1774, 1779-1784, 1787-1789). *Pollack* testified about large payments to the defendant for special privileges including telephone use, liquor (stricken) and permission to leave the jail; all Pollack items relating to sex were stricken or

otherwise eliminated from the Jury's consideration (40a; Tr. 633 et seq., 1376-1377, 1760, 1787-1789). *Richardson* produced telephone company records (no probative connotations as to any issue except as to whether specific calls were made on specific telephones at the jail) (40a). *Plucino's* testimony (theater tickets in connection with Pollack and the defendant) were stricken (41a; Tr. 1326-1329). *Lovico* testified about Pollack's being outside the jail at a time when he was a prisoner there (no probative connection as to scienter on the part of the defendant) (41a-43a). *Carey* testified as Grand Jury foreman (purpose of the Grand Jury investigation) (43a). *Mallon* and *Mesnig* testified about Pollack's personal property records at the jail (no Mann Act connection shown in this testimony) (44a, 50a). The Government's final witnesses, Mrs. *Concetta Fiore* and *Joseph Fiore* added nothing on any Mann Act aspect (49a; Tr. 1682-1688, 1740-1743, 1746-1747).

The defense introduced character testimony (44a—Tr. 1918; Tr. 1395-1403). The defense also called three employees of the Hudson County Jail, Salvatore Joseph Amato (44a; Tr. 1404-1453), Samuel D. Grier (45a; Tr. 1454-1458), and Patrick Henry Kiernan (45a; Tr. 1458-1488), who testified to various exculpative facts and circumstances concerning procedures and happenings at the Hudson County Jail to which Government witnesses had testified.

The defendant, Henry B. McFarland, took the stand in his own defense (46a-49a; Tr. 1494-1670). The defendant answered all questions, and he denied the indictment charges and the accusations of the Government witnesses in all respects. The Trial Court's marshalling of defendant's testimony, in the instructions to the Jury, covers most of

the points which we would here emphasize (46a-49a); we would add the following: In regard to the alleged use of telephones by prisoners at the Hudson County Jail, petitioner gave what we respectfully consider was important clarifying and explanatory testimony. At Tr. 1519 petitioner stated that by law, every prison warden in the United States "Has the authority to permit telephone calls when he rules on it. That is a warden's right and that is in every institution in the country. He is the supreme authority in the jail". At Tr. 1540-1542 petitioner further explained that (evidently referring to the plenary authority of prison wardens as just noted) when the Grand Jury questioned him about telephone calls by prisoners, his answers denying that he had permitted such calls were prompted by his then impression that the Grand Jury's questions in that regard were focused on the prostitution aspect; in short, petitioner insisted in this trial, and we think convincingly, that he had no intention to deceive the Grand Jury by any such sweeping or unqualified denials (regarding use of telephones) as those which the Government contends were intended by him under Count Two, especially, of this indictment.

The foregoing represents, after elimination of the items mentioned as having been stricken or otherwise withdrawn from the Jury's consideration, the final residuum of the proofs on which this case went to the Jury—under the remaining (i.e., non-dismissed) counts of the indictment, Counts Two and Three, which as seen, carried no express Mann Act items and stood necessarily divested of any Mann Act connotations by reason of the Trial Court's overall rulings.* Indeed, even the summation to the jury by the

* The record references for those rulings are collected in the footnote on page 11, *supra*.

notably zealous prosecutor in this case was meticulously bare of any Mann Act or other "sex" references of any kind except for general remarks as to the purpose of the Grand Jury investigation (Tr. 1824-1871). Likewise the Court's charge to the Jury was absolutely devoid of any such references or connotations (14a-52a).

The rulings of the Court of Appeals in affirming the conviction will be discussed in pertinent aspects under our "Reasons" *infra.* Also the facts relating to our Question Presented no. 9, *supra,* as to the prosecutor's concealment of the psychiatric history of the witness Ruth Karsh, will be taken up in our discussion of that point under our "Reasons".

REASONS FOR GRANTING THE WRIT

I

In view of the elimination from the case, as submitted to the jury, of all Mann Act references except the purely formal continuing allegation of grand jury "purpose" or "materiality", i.e., in view of the fact that the case as submitted to the jury had been wholly divested of any of its original ostensible character as a "Mann Act perjury" case and had washed down to nothing more than a case of alleged Federal Grand Jury perjury in regard to a subject matter of a purely local or State cognizance, the judgment of conviction on a charge of perjury committed before a grand jury investigating Mann Act violations should be reversed, and the indictment dismissed, as being repugnant in the most fundamental sense to due process of law, the just and rational administration of federal criminal justice and even to the subject matter jurisdiction limitations which the Constitution imposes on the power of the United States to punish crimes.

This case has to be approached in terms of first principles. It is one of those criminal cases in which the fatal vice giving rise to the main ground for reversible error lies embedded in the very roots of the case and permeates its entire structure. Too many impermissible assumptions of a purely doctrinaire nature have to be indulged to justify this extraordinary Grand Jury perjury conviction.

As seen, Count One of the indictment,* which was stricken or dismissed, had been based on an express Mann Act item. Count Two dealt only with use of telephones. Count Three dealt with miscellaneous "special privileges." (Neither

* As previously noted, we print in Appendix 4 hereto, *infra*, the text of the entire indictment with use of italicized type to indicate what was withheld from the trial jury's consideration.

Count Two nor Count Three involved any express Mann Act items.) Count Four, which was stricken or dismissed, had involved express Mann Act items. In consequence of these eliminations from the indictment, and of the exclusionary rulings on testimony previously described, this case, in the posture in which it went to the Jury was a "Mann Act perjury" case *in name only*, totally divested of both all *charges* and all *proofs* in reference to any Mann Act aspects except the generalization that the Grand Jury had been investigating violations of the Mann Act; and petitioner found himself having the question of his guilt or innocence of federal Grand Jury perjury submitted for consideration by a trial Jury which had nothing before it except alleged perjury by petitioner in answering questions about purely local or State prison "housekeeping" matters involving telephone use and miscellaneous other petty privileges of prisoners, none of which retained any continuing probative or judicially cognizable connection with the original ostensible Mann Act subject matter before the Federal Grand Jury.

We suggested above that impermissible assumptions of an unwholesomely doctrinaire nature have to be indulged to justify the conduct, course and result of this most strange Federal Grand Jury perjury prosecution. One of these doctrinaire assumptions is that, on the basis of the prevailing Federal rule of Grand Jury "materiality"—whereby a perjury charge may be founded on false testimony having a "tendency" to "obstruct" the Grand Jury's investigation of a subject which it is "competent" to investigate—a perjury conviction can be had even though the alleged "materiality" has vanished from the case by the time it is submitted for the Trial Jury's consideration. The admittedly broad test of Grand Jury "materiality" just

mentioned (e.g., *United States* v. *Marchisio*, 344 F. 2d 653, 665 (C.A. 2, 1965); *United States* v. *Collins*, 272 F. 2d 650, 653 (C.A. 2 1959)) was never intended, we submit, to produce a result such as that which has come about in the instant case. If this is what the prevailing doctrine of Grand Jury "materiality" means, if the doctrine has this plenary or indeed rather this seemingly infinite scope, then any Federal Grand Jury could declare itself to be investigating any subject of Federal criminal "competence," and any witness whose allegedly false testimony arguably comes within the plenary canopy of "materiality" could be imprisoned for perjury, even though at the perjury trial the *probatum* as submitted to the trial jury has ended up being totally divested of any connection with the originally claimed topic of Grand Jury "competence." Nor is this frightening prospect rendered significantly less likely for future situations by considerations of whether a particular Grand Jury has been launched upon a particular investigation with the benefit of specific charges from accusing witnesses, rather than merely engaging in a roving investigation. The abuse of which we here complain in regard to doctrinaire utilization of the principles of Grand Jury "materiality" and "competence" is no less acute or constitutionally offensive when the accusatory testimony claimed to have justified Grand Jury "competence" washes out *in toto* at a subsequent perjury trial, as has happened in this case.

The situation may be analyzed along the following further lines:

1. The Trial Court should have granted the defense motions for acquittal on the entire indictment. Merely to determine, as the Trial Court did, that the technical test of

Grand Jury "materiality" under the prevailing general rule was satisfied as a matter of law, did not justify (much less require) the further determination that the case should be submitted to the Jury as a "Mann Act perjury case" after it had been so totally divested of its Mann Act aspects. The Trial Court should instead have made a determination as a matter of law, in the exercise of a wise legal judgment, that the conventional rule of "materiality" was intrinsically impossible of just application in this case because neither charges nor proofs remained in the case from which a Trial Jury could rationally and justly deduce a verdict of conviction for "Mann Act perjury". All that finally went to the Jury in this supposed "Mann Act perjury" case was the formalistic *rump* element of a *memory* of what had once been thought to be Grand Jury "materiality" and "competence" in this case. The sheer juridical irrationality of a contention that this case was rightly submitted to the Jury, or that it could be rationally decided by a Jury in terms of the indictment charges, presents analytical difficulties which defy ultimate logical or legal analysis, yet our minds tell us that what happened here was irrational and legally wrong. The analytical difficulty may perhaps be elucidated along the following further lines.

2. To apply the concepts of Grand Jury "materiality" and "competence" in such a manner as to allow a perjury conviction to be ultimately derived by a Jury from a record like the instant one, is to sacrifice the standards of rational criminal justice in favor of a kind of mere legal nominalism. Perjury is too grave a matter from the standpoint of both prosecution and defendant to be settled by legal nominalisms. Proof of criminal guilt—*a fortiori* in perjury—is *par excellence* and *de rigueur* a matter of the concrete, not of

the abstract or the nominalistic. What concrete proof did this Trial Jury have before it, indeed what concrete *charge* even was before this Jury, that could justify or enable the Jury to decide whether the defendant had violated the Federal prejury statute in the setting alleged by the indictment, namely, a setting of alleged Mann Act violations? Simply as a matter, then, of what a criminal trial jury should or should not be expected and allowed to do as "triers of the facts" upon a charge of grave crime carrying severe penalty, the intrinsic unsuitability of sending this case to this jury must be taken into consideration as a matter of law and of correct judicial administration.

3. In our preceding two numbered paragraphs we have been focusing primarily on the difficulties which this case presents from the standpoint of a rational system of trial by jury. Of no less importance are the challenging problems which the case insistently presents from the standpoint of the Judge—both at the trial and the appeal levels. In our opening remarks for this "Reason" I, we intimated the theme of which we now wish to speak more fully, namely, that the prevailing doctrines of Grand Jury "materiality" and "competence" should not be allowed to lead to unjust doctrinaire results. When an initially ostensible subject matter of Federal Grand Jury "competence" is later found to be—during the course of a Federal prosecution for perjury in the giving of "material" Grand Jury testimony "tending to obstruct" investigation of the "competent" Grand Jury subject matter—an empty abstraction for purposes of criminal prosecution or conviction, but when nevertheless such prosecution is allowed to proceed to conviction, the lawyer or Judge whose sense of proper constitutional tradition is called into play on the problem, cannot but be

concerned about the following questions: Has the defendant been convicted (as here) under an indictment which is defective for "failure to charge an offense", when the indictment is considered (as it must be) in the form and in the setting in which it was (here) submitted for the Jury's final consideration? Has the defendant been convicted, indeed further, for an offense *not charged in the indictment* (i.e., in this case, the alleged offense of having falsely denied to a Federal Grand Jury that he accepted payment for various "housekeeping" favors to prisoners in a local or State prison institution governed by State law)? This last, in turn, compels the even more fundamental and in fact classic question, a question at constitutional level, of whether the defendant has been convicted under an assertion of Federal criminal prosecutive authority for what plainly amounts to a perjury charge over which only the State of New Jersey could have constitutional jurisdiction, i.e., the charge that the defendant has falsely denied illegalities in the internal administration of a State prison institution, without any connotations which could justify the attaching of the Federal "jurisdiction"? In its largest (but at the same time in its most meaningful) sense the question becomes, finally, has the defendant been denied due process of law by reason of all of the above mentioned fundamental defects in the proceedings, including the Federal government's improper and unauthorized assertion of authority to prosecute and punish him for those particular matters (and only for those matters) which were found to be all that could properly be submitted for consideration by this Federal Trial Jury?

We earnestly state that we do not think we are speaking at all too loftily in advancing the foregoing argument as to the legal and constitutional improprieties of this perjury

conviction. As above said, we are convinced that this conviction violates "first principles", and if discussion of the case in those terms has inevitably taken us into a pretentious-sounding exposition smacking of a lecture on legal "classics", we respectfully state that the injustices to which we are here addressing ourselves do seem to us to require exactly this kind of fundamental, or "classical", appeal to "first principles".

The necessity we feel to plead this certiorari issue in the above manner reflects also that the case does not seem to be covered by decisional "precedent", so far as we can find. Doubtless this is attributable to the fact that no similar extraordinary deviation in the field of Anglo-American perjury prosecution has heretofore been essayed by any prosecutive authority or approved by any court of record, at least so far as the reported decisions reveal. In this apparently unique situation, then, principle must supply the lack of precedent. The Court of Appeals, in rejecting our contention as to the constitutionally incongruous and impermissible way in which the federal power to punish perjury has been applied in this case, spoke of "cloudiness" in our argument, and it charged us with not correctly understanding the purpose of the "materiality" rule under the federal perjury laws; the Court of Appeals summed up the matter by saying, "Once it be conceded that the Grand Jury was investigating matters within its jurisdiction, materiality to that investigation is the only link the Government must establish between the testimony and the federal criminal law"; and, the Court further said, "Applying these principles to this case, it is apparent that whether appellant was accepting money for allowing inmates unusual telephone privileges (the second count) and special

favors (the third count) would have a bearing on an investigation into whether prostitutes were being illegally transported to the jail" (Appendix 1 hereto, *infra*).

In our petition for rehearing in the Court below we tried to assure the Court that we do appreciate the analytical impact upon this case of the prevailing rule of Grand Jury "materiality". We have not been arguing in this case (at least we have not intended to argue) that by some anomalous process of retrograde or reverse "bootstrap-ism" the Grand Jury "materiality" literally vanished when the trial proofs washed out in the way they did in this case. The Court below apparently interpreted our argument as having amounted to nothing more than some such formulation as that which we have just paraphrased. Such was not and is not our intended theme. Our theme is, rather, that, in ultimate due process terms, it is wrong to let a Grand Jury "materiality" situation *of the kind here involved* result in a perjury conviction *under all of the circumstances here involved*. We were asking the Court below to see that, on the entirety of this trial record, an unyielding application of the conventional "materiality" rule turns that rule into a prosecutive instrumentality of a kind of blind injustice, with disturbing overtones moreover of excess of the federal jurisdiction to punish crimes. In effect, we were asking the Court below to exercise its supervisory power over the fair administration of federal criminal justice (cf. *United States* v. *D'Angiolillo*, 340 F. 2d 453, 456 (C.A. 2 1965), cert. denied 380 U.S. 955), by declaring that, in the overall circumstances of this case, the Constitution cannot tolerate conviction for perjury upon a merely literal application of the "materiality" rule. The Court of Appeals' opinion does not mention this theme of ours, except in one or two

tangential remarks. Our theme is not tangential for the purposes of this case; it is central to the case.

We have above spoken of this case as presenting an issue of due process of law; in our Question Presented no. 3, *supra*, we have urged that the due process question indeed is one of substantive and not only of procedural process. For, viewed in its fundamental constitutional aspect, the "anatomy" of this extraordinary Federal perjury conviction does pose nothing short of a challenge to the rule of substantive due process itself. The case goes beyond procedural due process. It enters the area of substantive due process because, in the last analysis, the case compels one to ask the classic question which familiarly defines what substantive due process is: Is it "reasonable"—i.e., is it substantive due process—to allow Federal prosecution and conviction for Grand Jury perjury in a matter so remote from any legitimate object of Federal concern? In this case, where the ultimate disposition condemning the defendant on a charge of grave crime and to serve a term of imprisonment has turned out to be a disposition based on literally nothing more than alleged improprieties in the internal management of a State or local prison institution, there being left in the case no remotest legitimate or realistic connotation of Federal jurisdictional concern (either legislative, executive or judicial), how can it be said that the substantive due process requirements of the Fifth Amendment have been obeyed?

II

Even if the Mann Act subject matter had not become washed out of this case, the allegedly continuing "telephone" subject matter of Grand Jury "competence" or "materiality" would stand constitutionally vitiated for any purpose relevant to this case because the supposition that a Federal Grand Jury may investigate "illegal" use of telephones (as for prostitution activities) arises from a quite erroneous and indeed unconstitutional reading of the Federal Communications Act.

In our "Reason" I, *supra,* we were addressing ourselves to the question of the various ways in which the elimination of the Mann Act subject matter vitiated for Federal jurisdictional and constitutional purposes all remaining subject matter under the indictment; and implied in our argument *supra* was the contention that the alleged Federal Communications Act subject matter of the use of telephones by prisoners at the Hudson County Jail for such Mann Act purposes had necessarily also been eliminated from the case with the elimination of the apparently indispensably generating subject matter derived from the subsequently eliminated Mann Act suppositions. The topic to which we now turn has to do with the Federal Communications Act subject matter in a more distinct sense. The question may be stated thus: Even if the Mann Act subject matter had not become eliminated from this case, could the Federal Communications Act subject matter in any event be validly included in this kind of indictment; or, can there legally or constitutionally be a Federal Grand Jury investigation of any supposed Federal "crime" of violating the Federal Communications Act by using or permitting the use of telephones to violate the Mann Act?

Over the past several years, it has apparently been taken for granted in some lower Federal Courts that the answer to a question of this latter type would be in the affirmative. We submit that such affirmative view proves, upon examination, to be wrong; and we believe that the following will demonstrate that the prevailing affirmative view concerning this question is based upon authorities and reasoning which have not been well thought out either in statutory or constitutional terms.

The view that one can "violate" the Federal Communications Act by "illegal" use of a telephone, as by using a telephone for gambling, prostitution activities, narcotics violations and the like, apparently found its origin in two decisions of the Third Circuit (the *Marcus and Testa* cases, *infra*) which were followed by the Court below in *United States* v. *Harris*, 334 F. 2d 460 (C.A. 2 1964), reversed on other grounds, 382 U.S. 162, and in the instant case.

Let us look behind what may be termed the *stare decisis* "folk lore" of the *Harris* decision in the Second Circuit (334 F. 2d 460). The latter decision held that where a Grand Jury subpoena stated that the Grand Jury was investigating alleged violations of the Federal Communications Act, 47 U.S.C. §§203 and 501, where the witness declined to answer questions concerning a telephone call from Florida to New York City for the purpose of promoting an illegal dice game in Florida, and where the witness after receiving immunity under §409(1) of the Communications Act persisted in his refusal to answer, the witness was properly convicted of contempt. The Court said (334 F. 2d at p. 463):

> " * * * In support of its own position the government weaves the following argument: The Federal Com-

munications Act makes unlawful the act of any person causing a telephone company to extend telephone services not provided for in its tariffs, 47 U.S.C. §§ 203, 501. The tariff of the American Telephone & Telegraph Company, joined in by the Southern Bell Telephone & Telegraph Company, states that telephone service shall 'not be used for an unlawful purpose.' Thus, the government contends, when an individual uses telephone facilities for an unlawful purpose he causes the telephone company to extend to him services not provided for in its tariffs and consequently to violate the Communications Act.

On facts quite analogous to those here presented, the Third Circuit held that the government had sufficiently established the necessary link of a possible violation of the Communications Act, on the theory which the Government here proffers. Marcus v. United States, 310 F. 2d 143 (3 Cir. 1962), cert. denied, 372 U.S. 944, 83 S. Ct. 933, 9 L. Ed. 2d 969 (1963). See also United States v. Testa, 326 F. 2d 730 (3 Cir.), cert. denied, 376 U.S. 931, 84 S. Ct. 701, 11 L. Ed. 2d 652 (1964). Moreover, the government refers us to indictments which have been returned in other districts charging violations of the Communications Act under similar circumstances. Finally, we must recognize that the scope of the grand jury's investigation is not limited to the specific questions put to Harris. Indeed, further questioning might conceivably reveal the use of telephone facilities on a large scale in the promotion of unlawful enterprises, and corruption in connection therewith, which would certainly constitute a violation of the Communications Act, at least to the extent of any participation by telephone company representatives. On balance, we hold, as did the Third Circuit, that the government has established that the grand jury investiga-

> tion here is a proceeding 'based upon or growing out of [an] alleged violation of [the Federal Communications Act].' "

Thus, as we said, the Second Circuit in *Harris, supra*—and evidently again in the instant case—accepted as controlling the decisions of the Third Circuit in *Marcus* v. *United States,* 310 F. 2d 143 (C.A. 3 1962), cert. denied 372 U.S. 944; and *United States* v. *Testa,* 326 F. 2d 730 (C.A. 3 1964), cert. denied 376 U.S. 931. Let us examine the *Marcus* and *Testa* cases.

The *Marcus* decision contains no indication that the Government had presented for the Court's consideration, or that the Court had considered, any such theory as the one mentioned in the *Harris* quotation, *supra,* where, as the Court put it, "the Government weaves" its argument to support the Communications Act subject matter. Likewise in the *Testa* case in the Third Circuit (326 F. 2d 730) (also cited in *Harris, supra*), where the *Marcus* ruling was followed, there is no indication that the Court was proffered (by the Government) or itself considered any such theory as to the Communications Act subject matter (see 326 F. 2d at p. 734, fn. 3, dissenting opinion of Judge Kalodner on petition for rehearing).

In short, *Marcus* and *Testa simply took it for granted* that the Communications Act subject matter there tendered by the Government as having been a proper subject of Grand Jury investigation, was a legally and constitutionally valid subject matter for such Grand Jury purposes. There is no reasoning, no analysis, no doctrinal justification, indeed nothing except purely assumptive and conclusory decisional "foundation" in *Marcus* and *Testa* for the important new assertion of Federal Grand Jury competence

or jurisdiction—and, in turn, Federal criminal jurisdiction as such—there involved.

We therefore respectfully submit that the *Harris* case, in the Second Circuit, with its free reliance on the *Marcus* and *Testa* cases, has unjustifiably announced a *fait accompli* by a supposed judicial evolution to the effect that the Government, so far as appears, is practically without restriction in using one or another of the specific-subject-matter Federal criminal statutes, in conjunction with the Communications Act, as a means of inquiring into practically anything which zealous prosecutive officials may choose to denominate, no matter how conclusorily, as possessing or potentially possessing some "crime" involvement.

We would call attention to the following additional defects in the reasoning of the above mentioned Communications Act "crime" cases:

It does not appear that any point was raised or considered in the *Harris, Marcus* or *Testa* cases as to the constitutional question of whether a "violation" of the Communications Act may be founded upon "violation" of a "tariff" filed with the Federal Communications Commission by a private company. From the *Harris* case quotation *supra,* and from the language of §§203 and 501 of the Communications Act (47 U.S.C.), it is manifest that Congress has not itself set up the "prohibitions" against "unlawful" use of telephones within the meaning of the *Harris-Marcus-Testa* theory, but that it is the Telephone Company (or Companies) which has "legislated" these criminal "statutory prohibitions". In short, the criminal prohibition that is mounted by the *Harris-Marcus-Testa* theory derives from what amounts in effect to an unconstitutional delega-

tion of legislative power to private persons (the Telephone Companies). Moreover, under that theory, these private persons are permitted thus to "legislate" criminal prohibitions through the medium of filed "tariffs" which, to be perfectly realistic, virtually no one except a few telephone company officials and a few Federal Government officials ever see. There is no slightest clue or hint in the Congressional legislation itself that such "tariffs" are to be thought of by the ordinary citizen as importing substantive criminal prohibitions as to the purposes for which telephones are to be used; §203 of the Communications Act may be read in vain for any such clue or hint, that provision on its face being nothing more than a law relating to schedules of charges for telephone service, overcharges, rebates etc.; and §501 of the Communications Act being merely a "general penalty" provision. Authorities enunciating the axiom that legislative power may not be delegated to private groups are, e.g., *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Wagner* v. *Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922); and authorities collected in *Davis, Administrative Law* (1951), s. 21, and *Gellhorn, Administrative Law* (2d Ed. 1947), pp. 88-89.

Furthermore, there is an even more fundamental defect in the *Harris-Marcus-Testa* theory, namely, that the statute (47 U.S.C. §203) pursuant to which such Telephone Company "legislation" is supposedly "enacted" (*per* Telephone Company tariffs) does not actually authorize such delegated legislative power to be exercised by the Telephone Companies. The latter statute speaks only of schedules of charges, and of over-charges and rebates, etc., declaring that such schedules of charges (i.e., the "tariffs" as they are commonly referred to) shall be filed with the Federal

Communications Commission, and provides further that such schedules are to show also "the classifications, practices, and regulations affecting such charges". This latter language as to "regulations" etc. "affecting such charges" is the nearest that §203 comes to even remotely supporting any suggestion that the Telephone Company tariffs might contain provisions other than the "charges" themselves, and this language in regard to "regulations" etc. goes no farther than to authorize such "regulations" etc. *"affecting * * * charges"*. In other words there is nothing in §203 about "regulations" in any sense beyond regulations concerning the charges payable for services rendered by carriers under the Federal Comunications Act. Which is to say that there is no authorization in §203 for any such Telephone Company tariff "regulation" as is supposed to be applicable in the *Harris-Marcus-Testa* cases, i.e., a prohibition against using a telephone for an "illegal" purpose. Nor can we find any regulation by the Federal Communications Commission implementing any such supposed statutory authorization—see *Code of Federal Regulations,* Title 47 ("Telecommunications").

In *Ambassador, Inc.* v. *United States,* 325 U.S. 317, the Court, in ruling that Telephone Company tariffs could legally regulate the charges made by hotels in connection with telephone use by guests, said (p. 323):

> "Of course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. * * *"

This is a recognition by this Court that Telephone Company tariffs of charges for telephone service are not to be

countenanced as a device for imposing substantive regulatory controls upon the conduct or activities of telephone users. While the Court in the *Ambassador* case, *supra*, also said that the Communications Act "recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities" (p. 323), it is evident that the Court was there speaking strictly in the context of a Federal regulatory power to prevent "an unjust or unreasonable discrimination or preference" (*ibid*) in the schedules of rates and charges for communication services; and while the Court also said in this same portion of the opinion in the *Ambassador* case that "the supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is 'charges, practices, classifications, and regulations for and in connection with such communications service' * * * 47 U.S.C.A. §201(b) * * * " (*ibid*), the Court in this language likewise was speaking of the subject matter and aim of the Communications Act in regard to maintaining "just and reasonable" tariffs of communications company charges for services. Besides, in referring to §*201(b)* of the Communications Act (in the portion of the *Ambassador* opinion last quoted), as allowing the broad range indicated for the Federal regulatory power under this statute, the Court was *not* referring to §*203*;* that provision, as we have seen, is cast expressly and solely in terms of "schedules of charges" and "regulations" etc. "affecting such charges." If Congress had intended to let the Telephone Companies themselves, *via* their filed tariffs, import into the Federal regulatory (and indeed criminal prohibitory)

* Under which the Telephone Company "tariffs" are filed.

scheme under this legislation, provisions concerning "illegal" use of telephones, it could readily have done so. There is not one word in the Federal Communications Act from which any such Congressional intention may be spelled out. And it is no answer to this to say that the Federal Communications Commission itself, under the broader language of §201(b)—upon which the Court commented in the *Ambassador* case, *supra*—could adopt general regulations concerning such "illegal" use of telephones, because even if it were conceded (which we respectfully decline to do) that the Commission could in this manner create *criminal prohibitions* of this drastic sort when Congress has not seen fit to do so, such *arguendo* concession would not justify the conclusion that the Telephone Companies themselves are given this ominous power to incorporate such criminal prohibitions in their filed tariffs.

We thus see the following really extraordinary situation under the *Harris-Marcus-Testa* theory:—The Communications Act lets the Telephone Companies file "schedules of charges" (tariffs) which may contain also "regulations" etc. "affecting such charges" (§203). The Telephone Companies then file tariffs which go drastically further by including a prohibition against use of telephones for "illegal" purposes (e.g., gambling, prostitution, etc.). The Government then invokes such manifestly *ultra vires* tariffs as assertedly forming the basis for next invoking §501 of the Communications Act which, as noted is merely a "general penalty" provision to punish persons who violate the Communications Act. Not only, then, is there an absolute lack of statutory authority for a Telephone Company tariff prohibition against "illegal" use of telephones, and not only

(consequently) is there an absolute lack of any basis for spelling out a statutory violation upon which the general penalty of §501 may operate, but, even more strange, there would have to be an abrogation of the constitutional ban against delegation of legislative power to private persons* in order to sustain as valid this remarkable attempted reading of the statutory language.

If we are correct in our above argument that no constitutionally maintainable Federal criminal jurisdiction of the type referred to arises under the Communications Act, then Counts Two and Three of the within indictment—being the remaining counts and the only conviction counts—must for that reason alone fall insofar as they involve the subject matter of use of telephones. That is to say, the references in the indictment to the Federal Communications Act, *viz.*, the asserted basis for the charges relating to use of telephones by prisoners at the Hudson County Jail, are the sole foundation for Count Two of the indictment, and they form also an important part (albeit in a more generalized, but nevertheless essential, form) of the foundation for Count Three of the indictment—these being the only two counts which were submitted to the Jury, and on both of which petitioner was convicted. In other words, the original indictment charges were dependent upon the Mann Act matters in the first instance, to which in turn there was adjoined by the Grand Jury a Federal Communications Act subject matter (which of course was purely derivative from the Mann Act matrix); then the Mann Act items

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* *A fortiori* in the circumstances of cases like *Harris* (and our case) this traditional constitutional ban would have to be abrogated in regard to the most potent of all forms of legislative power, the legislative power to declare what are crimes.

went out of the case as seen, but there remained for the Jury's consideration (under the Court's instructions) the Federal Communications Act items (in a form no longer integral with the Mann Act items). It is submitted that our above presentation under this "Reason" II requires the conclusion that no residual or continuing legal force supposedly deriving from those Federal Communications Act items can avail to justify the within conviction of petitioner.

III

The improper conduct of the Government in not sooner revealing its information about the relevant psychiatric history of the witness Ruth Karsh, misconduct for which both of the Courts below reprimanded the Government, resulted in the apparently irretrievable lodging on the trial record of the inflammatory direct testimony of Miss Karsh, created thereby a situation in which it was impossible to disabuse the jurors' minds of the lurid testimony thereby contaminatingly infused into this intrinsically sensational case, caused inevitably a denial of fair due process trial, and requires this Court's intercession in the interest of the decent administration of Federal criminal justice.

The Government called to the stand in this trial Miss Ruth Blanche Karsh (38a-39a; Tr. 527 *et seq.*). She had been confined at the Hudson County Jail as a material witness in 1963 or 1964 (Tr. 528-529). A friend, Joseph Fiore, had also been at the jail at that time on a charge of armed robbery (Tr. 530). After Miss Karsh's release she visited Fiore three or four times a week, most of the time in the counsel room on the first floor of the jail (Tr. 530-533). She said that nearly each time she came to visit Fiore she gave

the defendant small sums, $2 or $3, the largest payment being $5 (Tr. 536-587—see also Tr. 537-538). While the following items of Miss Karsh's testimony were ultimately stricken or otherwise not submitted to the Jury, they were received in evidence and came to the jury's attention in the witness' direct examination: (1) At Tr. 538-545 she testified to having met or seen a person named Konigsberg in the presence of the defendant at the jail and that later the defendant spoke to her in a manner susceptible of meaning that he was suggesting she have intercourse with Konigsberg at the jail. (2) She testified that she had sexual relations at the jail with Fiore (Tr. 546); and see Tr. 546-561, a lengthy questioning of Miss Karsh by the prosecutor evidently designed to elicit from her that the defendant knew she was having relations with Fiore at the jail, but this latter question failed of its purpose. As mentioned, the foregoing testimony of Miss Karsh concerning alleged improprieties involving Konigsberg and Fiore was eliminated from the case under the various exclusionary and limiting rulings of the Court later in the trial. In the instructions to the Jury, when the Court marshalled the evidence concerning Miss Karsh, all reference to the above items was omitted except for a general reference to her having seen Konigsberg in the defendant's office and her having had a conversation with the defendant concerning Konigsberg (39a; Tr. 1910).*

A development of the first importance occurred when Miss Karsh came under defense cross examination. It emerged that she had a grave history of mental disturbance

* The Court in the instructions just mentioned did not refer to Konigsberg by name, but to a man depicted in certain photographs (Government exhibits 20 and 21).

apparently covering the period of the alleged happenings to which she testified in this trial, and that the prosecutor had evidently known of this but had not disclosed it to the defense or to the Court.* Miss Karsh's history of psychiatric trouble only came to defense counsel's attention by accident, as it were, when at Tr. 572-573 the witness was being cross examined about her employment and she happened to state that prior to her then employment she had been "in a hospital" for eight months, and a moment later she revealed that it was "Manhattan State Hospital", an institution for the mentally ill (Tr. 573). The prosecutor at once objected on the ground of irrelevancy to the issues in this case (Tr. 573).** The Court permitted defense counsel to continue, and when the witness next stated that she had been released from Manhattan State Hospital in September 1965†, defense counsel requested permission to make an application at the Bench (Tr. 573). In the ensuing colloquy, at the Bench, defense counsel protested against the prosecutor's having offered Miss Karsh as a witness under the circumstances above disclosed, and requested a continuance of his cross examination of Miss Karsh "until I can have access to the records of the Manhattan State Hospital to see what diagnosis was made and to see if this witness is competent to testify in this case in view of what may

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* A disclosure to the Court, but not to the defense, may perhaps be said to have been made by the prosecutor in the course of submitting Miss Karsh's "3500" materials for the Court's inspection after Miss Karsh had concluded her direct testimony (*infra*), but as indicated in the text above there was no previous disclosure.

** It is thus to be noted that the prosecutor not only had failed to disclose what he knew of Miss Karsh's psychiatric history, but also that he evidently considered it proper to *continue* to have this important subject matter withheld from attention.

† Her within testimony was being given on May 6, 1966.

have happened eight months ago, which was so close to the time that she testified she visited the jail" (Tr. 575; and see Tr. 574-575). The prosecutor insisted, in effect, that nothing in the above described developments unexpectedly revealed for the first time by the defense cross examination was cause for any defense objection (Tr. 576). There followed a brief discussion (still at the Bench) between the Court and the prosecutor as to production of the hospital records for preliminary inspection by the Court *in camera*, the prosecutor still expressing a strong reluctance if not opposition, and the prosecutor adding that defense counsel's statements that it was wrong for the Government not to have disclosed its knowledge of Miss Karsh's psychiatric history was "reprehensible" and "unethical" on the part of defense counsel (Tr. 578; and see Tr. 576-578).* The Court then directed the prosecutor to procure the hospital records and that in the meanwhile the defense cross examination of Miss Karsh should proceed a little further (Tr. 579).

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* *The expressions of indignation by the prosecutor above mentioned—in which the prosecutor was reproaching defense counsel for reproaching the Government in connection with its non-disclosures concerning Miss Karsh—make it pertinent for us to state as follows at this juncture in our presentation herein:—This trial was attended by many verbal clashes between the prosecutor and defense counsel. It is our own view that these incidents were generated by the nature of the case and by the prosecutor's failure to appreciate the problems of basic justice which had been created by the very bringing of this extraordinarily peculiar "Grand Jury perjury" prosecution. As we indicated in other connections *supra*, this case both in its prosecutive inception and in its probative consummation at the trial betrays a failure of proper prosecutive judgment in the enforcement of the Federal perjury laws. It is our earnest belief that this was never a proper case for Federal perjury prosecution, but that a feeling of over-zealous commitment to the case on the part of the prosecutor in charge inevitably led to excesses by the prosecution during this trial. See also the defense motions for mistrial on grounds of prosecutive misconduct (Tr. 1287-1296, 1305—with which see, e.g., Tr. 86-87, 109-110, 150-156a, 314-315, 362 et seq., 515-516).

Miss Karsh's next testimony was that she had gone to Manhattan State Hospital in February or March 1965 because she was "very upset", that she was subject to episodes of becoming "scared or something" and would go see a doctor when such occurred, that this had been going on for about five years since her mother died, that she had twice been a psychiatric patient at Mt. Sinai since 1961, once for three months and once for two weeks, that she had gone to Manhattan State Hospital directly from her last stay at Mt. Sinai, that she was a psychiatric patient at Mt. Sinai when she testified before the instant Grand Jury in April 1965, and that (apparently) she had not told the Grand Jury that she was then at Mt. Sinai (Tr. 579-585).

Following this testimony of Miss Karsh defense counsel again asked for permission to defer his further cross examination pending an opportunity to examine the medical records, which was granted (Tr. 585-588). Over the following trial weekend the Court inspected the hospital records of Miss Karsh. At the next trial day the Court, in the robing room, asked the prosecutor what he knew of Miss Karsh's medical history when he brought her in to testify; he replied that he "knew that she had been under some treatment for an emotional disturbance"; when the Court asked him whether his investigation had ended there or whether he had done anything to find out the nature of the emotional disturbance, the prosecutor replied that "That was all I knew about it", and "I did not make any effort to inquire at the places that she was treated or the doctors that treated her"; when the Court asked him whether he had made any effort to determine whether Miss Karsh

was competent to testify, the prosecutor replied, "Not other than my own estimate of her * * * I was very well satisfied that she was in all respects competent * * * "; when the Court asked him whether he had made any inquiry as to whether Miss Karsh might be exposing herself "to any dire act on her own part* in the event she became emotionally disturbed", the prosecutor replied that "I understood * * * the possibility that she might be exposing herself to a strain undoubtedly, but I was satisfied from talking with her that she was able to withstand it"; the prosecutor further stated that he had made this determination by himself without participation by any one in the United States Attorney's office and that none of his superiors in that office had received a report from him as to Miss Karsh's medical history; he answered affirmatively the Court's question, "You took this strictly on your own responsibility?" (Tr. 591-593).

The Court then announced (still in the robing room) that it had examined the hospital records, which "disclosed that this young lady witness has had a series of problems for some time", and that the diagnosis at Manhattan State Hospital was "schizophrenia (other types) [*sic*] and schizo-affective" (Tr. 593). A staff conference note or summary at Manhattan State Hospital on September 17, 1965 reported her "much improved" and recommended that she be discharged in her own custody, which was done (Tr. 593-594). The Court then stated that "under the circumstances, I will permit the cross examination to go forward" (Tr. 594). The Court added that in view of the unusual

* The Court had evidently seen in the hospital records (*infra*) that she had suicidal tendencies.

circumstances—i.e., that the witness had been exposed to direct examination without disclosure of the medical history and the question now was as to whether she should be subjected to cross examination—it had discussed the matter with Chief District Judge Ryan, and that after the Chief Judge had received a summary of the medical reports which Judge Croake (the trial Judge herein) had examined, the Chief Judge had agreed that the cross examination should go forward (Tr. 596-597). The Trial Court also said (Tr. 597):

> "* * * it would have been much more preferable if this matter had been explored more thoroughly by the Assistant United States [*sic*] and he had consulted with his superiors, and a determination made from the medical standpoint. I don't think these are matters that can be determined by lawyers. Those are matters that should be determined by certainly a psychiatrist and someone familiar with the history of this particular patient."

The Court then granted permission for both counsel to examine the medical records before resumption of the cross examination (Tr. 597). The prosecutor then objected that the medical records might contain private matters not relevant to this case and that such be withheld from defense counsel (Tr. 598). To this the Court replied that the medical records were voluminous, the prosecutor was putting too much of a responsibility upon the Court, and "* * * You have assumed a great responsibility, Mr. Fanning. You have taken a burden on your shoulders that you should not have done without at least consulting a doctor * * * in view of the fact that you have presented her here as a witness to this Court and without having disclosed

these facts, and they were only discovered after the completion of her direct examination and at the beginning of the cross examination, we now find ourselves in the posture where we have direct testimony, and this is a criminal case and even if we did the best we could by striking testimony of this nature, I think it is in the record * * * " (Tr. 598-599). The prosecutor then essayed another limiting tack, viz., that defense counsel should be confined, in examining the medical records, to dates directly affecting the issues of this trial, which the Court declined to do in view of the voluminous physical character of the records (Tr. 599-600). The Court added that the prosecutor was "taking the precaution a little late * * *. Any precaution you should have taken with regard to this young lady you produced as a witness on this stand and examined on direct examination and had difficulty in bringing forth certain matters and had to refresh her recollection several times, don't you think you are bringing this matter to the attention of the Court at a little late date?" (Tr. 600)

When the prosecutor thereupon again complained of defense counsel's statement that the prosecutor had attempted to conceal the fact of Miss Karsh's medical history, the Court drew attention to the following item which we are regretfully obliged to mention: The prosecutor had clipped from one of the "3500" exhibits handed to defense counsel an item disclosing that Miss Karsh had been treated psychiatrically in Mt. Sinai Hospital. This item had not been clipped from the exhibits as handed up to the Court, but it was subsequently clipped from the exhibit before turning the exhibit over to defense counsel, and it appears that the Court itself had not previously been aware that

the item thus clipped from the exhibit pertained to the subject matter here in question; the prosecutor defended having done this on the ground that "the Government's position was that it was not relevant to her direct testimony" (Tr. 600-601).*

Defense counsel was then given the item which the prosecutor had clipped from the above mentioned exhibit; the item was read into the record by defense counsel (still in the robing room) (Tr. 604-605):

> "She advised that after her release she attempted suicide by jumping in the river and is presently under treatment at the Psychiatric Institute, Mount Sinai Hospital, New York 29, New York. Miss Karsh exhibited her Mount Sinai identification card which showed her unit number to be 161930 and her last visit December 11, 1964. She stated that she is presently unemployed and exhibited a letter addressed to her from P. J. Maguire, Acting Manager, Office Personnel Placement Center, New York State Employment, 575 Lexington Avenue, New York, New York."

The prosecutor then placed on the record that the Government had no knowledge that Miss Karsh had come to the Grand Jury from a hospital (Tr. 605).

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* The prosecutor's surprising zeal in this case was rather dramatically instanced by his immediate next remarks to the Court following the above described incident which, one would have thought, might have had a moderating effect. Instead, the prosecutor went on to make a reference to a scandalous item in one of the "3500" documents relating to the witness Mrs. Janet Taccetta (p. 12, *supra*) to the effect that on three occasions the defendant himself had propositioned her, and the prosecutor started to add that "Miss Karsh, too, has told me that she too—", when the Court, evidently alarmed over these wholly irrelevant alleged disclosures, exclaimed, "Mr. Fanning, what are you talking about? You are putting something on the record. This may be reviewed by another Court." (Tr. 603).

The above described proceedings in the robing room were then adjourned to allow counsel to examine the medical records (Tr. 605a-606), after which defense counsel announced (again in the robing room) as follows (Tr. 606-607):

> "I have examined the records of this young lady. She has a long history of psychiatric difficulties. She has had several pregnancies and births out of wedlock. I have no intention of asking her any of those questions for fear that because of her history contained in the records that I examined, this young lady may be thrown back into a fit of depression or into an active episode of psychosis.
>
> She has been diagnosed as a schizophrenic. She appeared before the grand jury on April 1, 1965. She was certified by two physicians to be in need of commitment for her own protection to the Manhattan State Hospital on May 4, 1965.
>
> There is a history in the petition that she has been under treatment at Mt. Sinai psychiatric division for three months prior thereto and had been transferred from the Mt. Sinai psychiatric division to Bellevue Hospital, where the assistant director, Dr. Walker, petitioned her to be certified as in need of care.
>
> After she had been in Manhattan State Hospital from May 11th until July of 1965, the assistant director of Manhattan State Hospital asked that she be continued in custody and care, and from the witness' own admission, she spent some eight months there.
>
> Your Honor, I am going to develop these facts just on the record in front of the jury. I am not going to further cross-examine this girl for her own protection."

These proceedings in the robing room concerning Miss Karsh were concluded with a collateral discussion about Miss Karsh's prior pregnancies (the prosecutor being concerned that such should not be brought out on cross examination) and with the following remarks by the Court (Tr. 608):

> "* * * I would say that had this matter been brought to the attention of the Court in advance of her being presented as a witness, her direct testimony and the procedure might have been different, but I am confronted with the situation we now find ourselves in, and we will proceed."

The cross examination of Miss Karsh was then resumed (Tr. 610 *et seq.;* and see 39a). She testified that she had been treated at the Mt. Sinai Psychiatric Division on and off between 1961 and 1965; that in April 1965 she was transferred to the Bellevue Hospital Psychiatric Division*; while she was at Bellevue, New York Supreme Court Justice Joseph A. Sarafite had certified that she be transferred to Manhattan State Hospital for psychiatric treatment in May 1965**; and it appeared that the latter transfer-certification papers certified Miss Karsh for treatment as a "mentally ill" person (May 11, 1965), that on July 9, 1965 the Manhattan State Hospital found that she needed continued care and treatment, that her stay at Manhattan State Hospital was about six months, and that the diagnosis was that she was a schizophrenic (Tr. 611-613). The Trial Court further placed on the record that she had been discharged

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* Her Grand Jury appearance in this case was on April 1, 1965, as noted.

** Miss Karsh said that she had voluntarily requested this transfer (Tr. 612).

from Manhattan State in her own custody on September 17, 1965 (Tr. 614-615).

The prosecution witness whose testimony was undoubtedly most damaging to the defense, in the eyes of the Jury, was Miss Karsh, one of the few witnesses who testified as to any sexual improprieties. The only other witnesses who testified on that subject were Pollack (whom the Court itself expressly disparaged in the instructions to the Jury), and Viola whose criminal record and motivational status affected his credibility (pp. 12-13, *supra*). To be sure, the testimony of all three of these witnesses concerning sexual improprieties was eliminated from the Jury's consideration. However, atmospherically it could not be completely eliminated from the case, and we submit that we are therefore entitled to address ourselves, as we are here doing, to the issue of the prejudice caused by the prosecutor's conduct in not having revealed that Miss Karsh was a young lady witness of exceedingly dubious testimonial competence by reason of her unfortunate history of mental disturbance.

In *Powell* v. *Wiman*, 287 F. 2d 275, 278-279 (C.A. 5 1961), a State-originating *habeas corpus* case, relief was granted to the prisoner on the ground that the totality of circumstances relating to the State's failure to disclose or its suppression of evidence as to the credibility (including history of mental disturbance) of an accomplice witness resulted in fundamental unfairness amounting to denial of due process.

See also the recent Annotation in 7 A.L.R. 3d 8, at 144, collecting additional cases as to the duty of a prosecutor to disclose information tending to show mental incompetence of a witness.

W e are not overlooking that the prevailing general rule allows testimony by a claimedly insane or mentally incompetent witness if competence is found to be sufficient at the time of trial or in relation to the subject matter of the testimony. However, important and delicately difficult questions of fair legal procedure still attend any such situation, as is brought out in *Wigmore on Evidence* (3d Ed.), vol. II, §§ 228, 233, 492-497, where the author notes, *inter alia,* that the weight of authority apparently favors the requirement of an anterior finding by the Court alone (without Jury) as to competence (see especially *id.* § 497). We emphasize this last because the conduct of the prosecution in this case obviously thwarted the making of any such anterior judicial finding; and we submit that this, in itself, denied petitioner a fair trial.

The Court of Appeals in its opinion (Appendix 1 hereto, *infra*), stated as follows concerning the Government's above described conduct in regard to the witness Ruth Karsh:

> "We have carefully considered the question and do not find any harm to appellant from this incident: Defense counsel eventually learned all the facts of the witness's history in time to make full use of it on cross-examination, did get before the jury the essential information affecting her credibility, did not ask for any further adjournment, and did not move to strike the witness's direct testimony on the ground of incompetence. Cf. *Kyle* v. *United States,* 297 F. 2d 507, 513-14 (2d Cir. 1961). The fact that the witness had been a patient in a mental hospital did not render her incompetent as a matter of law, see 2 Wigmore, Evidence §497 (3d ed. 1940), and the trial judge handled the matter properly. However, this does not mean that the prosecutor's conduct was justified. We do not understand his position that

it was irrelevant for defense on cross-examination to bring out that a key prosecution witness had recently been in a mental hospital for several months. Moreover, the Government's silence as to the prior psychiatric history of the witness was improper, as was its own apparent failure to check further on the competence of the witness before calling her.[4] It must be emphasized that the Government cannot play it 'close to the vest' in administering federal criminal justice, when duty and conscience dictate that certain facts should be disclosed to insure a fair trial. Matters bearing on the competence of a witness to testify are of the gravest import, and the prosecutor may not disregard them or leave it to chance that his adversary will learn of them. Cf. *Powell* v. *Wiman*, 287 F. 2d 275, 278-79 (5th Cir. 1961); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136 (1964).

The judgment is affirmed."

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[4] The prosecution had not seen the voluminous hospital records, but was aware that the witness had been treated psychiatrically at Mt. Sinai Hospital.

In our petition for rehearing in the Court of Appeals we had to deal rather extensively with the above-quoted portion of the Court's opinion, because after the opinion had been rendered the Government wrote a letter to the Court of Appeals striving to justify its conduct as to Miss Karsh and requesting that the Government be absolved of impropriety. Respectfully deeming that this branch of the case is of sufficient importance to justify a full presentation before this Court notwithstanding the conventional limitations of space in a petition for certiorari, we print in our Appendix 6 hereto, *infra*, the entire text of the portion of our petition for rehearing in the Court below which deals

with the subject of the Government's conduct in regard to the testimony of Miss Karsh; including in said portion of our petition for rehearing, printed in Appendix 6, *infra*, is the Government's letter just mentioned in which the Court below was asked to absolve the Government of impropriety. In our petition for rehearing we went into additional details—i.e., additional to our presentation *supra* under this "Reason" III—as to the trial proceedings affecting this topic, and we take it that this Court may wish to examine with special attentiveness our Appendix 6 hereto, *infra*. We also urged in our petition for rehearing to the Court below (Appendix 6, *infra*) that the Court had evidently not given adequate consideration to our main point in regard to the Karsh episode, our main point having been that the Government's improper nondisclosure of Miss Karsh's psychiatric history had prevented us (and the Trial Court) from having an opportunity to litigate or to consider the issue of whether Miss Karsh should be allowed to take the stand as a Government witness at all, and that the Government's improper conduct had resulted in lodging Miss Karsh's outrageous testimony on the record as a *fait accompli* on direct examination; we urged in our petition for rehearing in the Court of Appeals that the prime issue was not, as the Court of Appeals apparently thought, whether we ultimately got proper opportunity for cross-examination of Miss Karsh, but that the prime issue instead was whether we had been deprived of our justly entitled opportunity to prevent her direct testimony altogether.

On rehearing the Court of Appeals amended its opinion on the subject of the propriety or ethics of the Govern-

ment's conduct in regard to Miss Karsh, and while the blow or reprimand of impropriety was perhaps slightly softened against the Government in the amendment to the Court of Appeals' opinion, the impact of the amended opinion is not significantly different in its reprimand to the Government. The amendment to the opinion below is printed as Appendix 2 hereto, *infra*.

While the Court below does not appear to have considered the Government's conduct concerning Miss Karsh as justifying reversing the conviction, we respectfully request this Court to make independent evaluation, and we submit that certiorari is justified on this point alone in the present case. *Cf. Berger* v. *United States*, 295 U.S. 78.

We would respectfully recall our earlier suggestion that in its entirety, this case is irreconcilable with a lawyer's sense of both procedural and substantive due process. We have previously referred to the prosecutor's apparent over-zealousness throughout this trial (fn., p. 38 *supra*). This is a case in which the prosecutor's over-zealous commitment to a prosecutive cause which intrinsically was non-maintainable, led the prosecutor into trial excesses, evidently from a wrongful zeal to keep alive a prosecution that should never have been given seed or at least should have been allowed to die on the vine once the supposed sources of its generating vitality were shown to have ebbed away. The prejudicial conduct of the prosecutor in this case forms a proper part of the overall due process inquiry here; it should be taken into consideration that the United States Government has here not only brought a bad and unjust criminal prosecution against a citizen but has pressed its wrongful cause with an insistency, an

intensity, indeed a militant fierceness, without which there may well have been a better chance for justice to the defendant in the jury room—and, yes, a better chance also that the Trial Judge himself might have implemented more resolutely the ultimate logic of his own rulings of law which, we say, pointed so plainly to the necessity of terminating this case without submitting it to a trial jury. The Government's disproportionate militancy in this strangely synthesized "perjury" case cannot be ignored as a factor in evaluating the large due process considerations which we advance in this petition.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
Henry B. MacFarland

APPENDIX 1

Opinion of Court of Appeals

[Amended by Order printed herein as Appendix 2, *infra*]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 245—September Term, 1966.

(Argued December 7, 1966 Decided December 29, 1966.)

Docket No. 30695

UNITED STATES OF AMERICA,

Appellee,

—against—

HENRY B. MCFARLAND,

Appellant.

Before:

LUMBARD, *Chief Judge,*

HAYS and FEINBERG, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Croake, *J.*, and a jury, convicting appellant of perjury before the grand jury, 18 U. S. C. §1621. Affirmed.

MAURICE EDELBAUM, New York, N. Y., *for Appellant.*

CHARLES J. FANNING, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Jack Kaplan, Douglas S. Liebhafsky, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Appellant Henry B. McFarland was convicted of two counts of perjury before a grand jury in violation of 18 U. S. C. §1621, after trial by jury in the Southern District of New York. Finding no error in his trial, we affirm the judgment.

Since appellant does not argue insufficiency of evidence, only a brief statement of facts is required. Since 1951, appellant had been the warden of the Hudson County Jail in Jersey City, New Jersey. In January 1965, a grand jury in the Southern District of New York was investigating the transportation of prostitutes from that district to the Hudson County Jail and the use of telephones in connection therewith. Appellant appeared before the grand jury on January 26, 1965, and the following December was indicted for perjury.

The indictment charged, *inter alia*, that the grand jury was investigating possible violations of the Mann Act, 18 U. S. C. §§2421-22, and the Federal Communications Act, 47 U. S. C. §§203, 501, to determine if those statutes had been violated by transporting women from the Southern District for the purpose of prostitution to the Hudson County Jail, and by the use of interstate telephone facilities in connection with such transportation; that the jury

was also investigating possible obstruction of the aforesaid investigation; that it was material to the investigations to ascertain appellant's relationship with one Marilyn Jean Fraser and whether appellant had accepted money from inmates of the jail for granting them special treatment such as use of telephone facilities, special meals and sleeping quarters, and visiting privileges including visits from prostitutes; and that appellant knowingly and under oath stated material matter which he did not believe to be true. There were four counts to the indictment, consisting of specifications of perjury relating to whether appellant (1) knew Miss Fraser; (2) permitted inmates, in return for money, to make telephone calls other than notification to their families that they were in custody; (3) permitted inmates, in return for money, to have special favors, such as special meals, special quarters, and visits from women; and (4) permitted prostitutes to visit one Harold Konigsberg and other inmates. Before the grand jury, appellant flatly denied knowing Miss Fraser or giving such permission. At trial, before the case was submitted to the jury, the first and fourth counts were dismissed for insufficiency of proof. On the second and third counts, there was ample evidence (if believed by the trial jury) that appellant, in return for money, had permitted inmates to make telephone calls and have special favors.[1]

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[1] *E.g.*, one inmate testified that he had paid the warden sums of money and received various favors including use of the telephone, the latter to such an extent that the warden complained "that I made too many telephone calls and I talked too long on the phone, that the bill was kind of high."

Appellant asserts that the dismissed counts were the only ones directly dealing with prostitution[2] and that their elimination, combined with the alleged irrelevance of the Federal Communications Act to any of the activities under investigation by the grand jury, made the remaining two counts inherently unsuitable for a federal perjury prosecution. Our vagueness in recounting appellant's principal point reflects the cloudiness of the argument. As best we can tell, appellant's claim is that since the Mann Act vanished from the case at the trial stage, the remaining questions and answers could not have been material or constitutionally proper at the grand jury stage because they were only an excursion into non-federal matters.

We think appellant is grossly mistaken as to the purpose and the proper application of the perjury statute that the trial jury found he had violated, 18 U. S. C. §1621. Essentially, the statute punishes lying under oath before a federal official or tribunal. No claim is made that the Government does not have a constitutionally enforceable interest in prohibiting such perjury. To be within the reach of section 1621, the lies must be material, which in this case means that "the false testimony . . . [must have] a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation." *United States* v. *Marchisio*, 344 F. 2d 653, 665 (2d Cir. 1965), quoting *Carroll* v. *United States*, 16 F. 2d 951, 953 (2d Cir.), cert. denied, 273 U. S. 763 (1927).[3] Appellant's crime is thus committed

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[2] The theory of the prosecution was that Miss Fraser (mentioned in the first count) visited the jail for purposes of prostitution.

[3] Materiality is a question for the court, and the trial judge properly reserved that issue to himself. *United States* v. *Marchisio*, 344 F. 2d 653, 665 (2d Cir. 1965).

in front of the grand jury, and materiality must be established only as of the time his answers were given. Materiality cannot "vanish" from the case "by the time it is submitted for the Trial Jury's consideration," as appellant contends; "materiality" refers merely to the relationship between the interrogation and the grand jury's objective at the time. Cf. *United States* v. *Siegel*, 263 F. 2d 530, 533 (2d Cir.), cert. denied, 359 U. S. 1012 (1959). Moreover, despite appellant's casual use of the term, there is no such concept as a "Man Act perjury" case under section 1621; a charge of lying under oath brought under that provision does not carry a burden of characterization of the lies according to another criminal statute. Once it be conceded that the grand jury was investigating matters within its jurisdiction, materiality to that investigation is the only link the Government must establish between the testimony and the federal criminal law.

Applying these principles to this case, it is apparent that whether appellant was accepting money for allowing inmates unusual telephone privileges (the second count) and special favors (the third count) would have a bearing on an investigation into whether prostitutes were being illegally transported to the jail. Appellant does not seem to deny that the grand jury was investigating possible Mann Act violations. In any event, there is no doubt but that the second and third counts concerned material testimony. It is therefore unnecessary to deal with appellant's additional involved contention that the questions and answers contained in the second and third counts were also not material to possible violations of the Federal Communications Act, an argument that apparently calls for us to overrule

United States v. *Harris*, 334 F. 2d 460, 463 (2d Cir. 1964), rev'd on other grounds, 382 U. S. 162 (1965).

Appellant also apparently claims that the entire testimony of Government witness Pollack should have been stricken after he invoked his privilege against self-incrimination and refused to answer two questions on cross-examination. These were whether Pollack had ever used another name, and whether he had numerous safe deposit boxes around the country in January 1966. These matters did not bear on appellant's guilt or innocence; they went to the witness's credibility only. Since appellant consumed a good part of two trial days in cross-examining Pollack, any contention that the cross-examination was improperly curtailed is almost ludicrous. In any event, the claims of privilege did not require striking of the witness's direct examination. *United States* v. *Cardillo*, 316 F. 2d 606, 611 (2 Cir.), cert. denied, 375 U. S. 822, 857 (1963).

Finally, appellant argues he was denied a fair trial by the prosecution's failure to timely and voluntarily disclose the psychiatric history of a Government witness. The issue arose in the following way: On cross-examination, the witness replied to defense counsel's inquiry as to her employment that she had been a patient in the Manhattan State Hospital for the mentally ill for eight months and had left eight months before trial. The prosecution objected to this line of inquiry and, when defense counsel asked for the right to examine the hospital records, objected to that too. At the trial judge's direction, the records were obtained and submitted to him over the week-end; in his words, they disclosed

> [T]hat this young lady witness has had a series of problems for some time. They were somewhat of a

physical nature at times and somewhat of a mental nature at times, but here she has been produced on this stand and she has given direct testimony.

I have examined the Manhattan State Hospital clinical summary and the recommendation made by Dr. Mavaroic was a diagnosis of "Schizophrenia (other types) and schizo-affective."

Her condition was reported much improved on September 17, 1965 . . . .

* * * * *

And on September 17, 1965, the patient was discharged in her own custody.

The records were then turned over to defense counsel to examine.

We have carefully considered the question and do not find any harm to appellant from this incident: Defense counsel eventually learned all the facts of the witness's history in time to make full use of it on cross-examination, did get before the jury the essential information affecting her credibility, did not ask for any further adjournment, and did not move to strike the witness's direct testimony on the ground of incompetence. Cf. *Kyle* v. *United States*, 297 F. 2d 507, 513-14 (2d Cir. 1961). The fact that the witness had been a patient in a mental hospital did not render her incompetent as a matter of law, see 2 Wigmore, Evidence §497 (3d ed. 1940), and the trial judge handled the matter properly. However, this does not mean that the prosecutor's conduct was justified. We do not understand his position that it was irrelevant for defense on cross-examination

to bring out that a key prosecution witness had recently been in a mental hospital for several months. Moreover, the Government's silence as to the prior psychiatric history of the witness was improper, as was its own apparent failure to check further on the competence of the witness before calling her.[4] It must be emphasized that the Government cannot play it "close to the vest" in administering federal criminal justice, when duty and conscience dictate that certain facts should be disclosed to insure a fair trial. Matters bearing on the competence of a witness to testify are of the gravest import, and the prosecutor may not disregard them or leave it to chance that his adversary will learn of them. Cf. *Powell* v. *Wiman*, 287 F. 2d 275, 278-79 (5th Cir. 1961); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 Yale L. J. 136 (1964).

The judgment is affirmed.

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[4] The prosecution had not seen the voluminous hospital records, but was aware that the witness had been treated psychiatrically at Mt. Sinai Hospital.

APPENDIX 2

Order of Court of Appeals (on Rehearing) Amending Opinion

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

HENRY B. MCFARLAND,

Defendant-Appellant.

PETITION FOR REHEARING AND (ALTERNATIVELY) MOTION FOR STAY OF MANDATE AND CONTINUATION OF BAIL PENDING CERTIORARI

Maurice Edelbaum, New York, New York, for defendant-appellant

Petition for rehearing by panel denied.

Motion for stay of mandate and continuation of bail pending application for certiorari granted subject to provisions of Rule 28(c).

"The opinion is amended in the following respects, all on page 707, slip opinion:

1. At line 15, a new footnote 4 is appended to the word 'silence,' the text of the footnote to read as follows:

4. We do not imply by this that the Government acted unethically. The Government correctly claims that

it did disclose to the court that the witness had been treated psychiatrically at Mt. Sinai Hospital. The disclosure was contained in one of the exhibits submitted to the court under the Jencks Act after direct examination of the witness had been concluded. However, there was at least a question as to whether this information should have been made known to defense counsel sooner; the matter, therefore, should have been specifically taken up with the court before the witness took the stand. Defense counsel could then have been apprised of the witness's history under appropriate judicial supervision.

2. At line 16, the word 'improper' is changed to 'ill-advised.'

3. At line 18, old footnote 4 is renumbered as footnote 5."

J. EDWARD LUMBARD

PAUL R. HAYS

WILFRED FEINBERG

U.S.C. JJ.

January 26, 1967

APPENDIX 3

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of December one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HENRY B. MCFARLAND,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX 4

Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

"The Grand Jury charges:

1. On or about the 26th day of January, 1965, in the Southern District of New York, HENRY B. MCFARLAND, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, in a case in which a law of the United States authorizes on oath to be administered, to wit, a Federal Grand Jury of the United States of America, duly empanelled and sworn in the United States District Court for the Southern District of New York, and which was then and there inquiring for that District into offenses committed against the United States, did unlawfully, wilfully and knowingly and contrary to said oath, state material matter which he did not believe to be true, as is more fully set out hereinafter.

2. At the time and place aforesaid, the Grand Jury, inquiring as aforesaid, was conducting an investigation pertaining to possible violations of the White Slave Traffic Act and the Federal Communications Act, *more particularly, Title 18, United States Code, Sections 2421 and 2422, and Title 47, United States Code, Sections 203 and 501,* and other federal criminal statutes, for the purpose of determining whether any person violated such statutes by transportation of females in interstate commerce from the Southern District of New York for the purposes of prostitution at the Hudson County Jail, New Jersey, and by the use of inter-

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

state telephone communication facilities in connection with such transportation, or engaged in a conspiracy to commit such violations; and further, was conducting an investigation to determine whether any person had violated or conspired to violate the Obstruction, of Justice statute, *Title 18, United States Code, Section 1503,* by obstructing and impeding the aforesaid investigation into possible violations of the White Slave Traffic Act and Federal Communications Act and other federal criminal statutes.

3. It was material to the investigations described in paragraph 2 hereof that the Grand Jury ascertain *whether the defendant, Henry B. McFarland, the Warden of Hudson County Jail, knew or had ever met Marilyn Jean Fraser, and the extent, if any, of his relationship with her. It was further material to ascertain* whether the defendant had ever accepted any money or other things of value, directly or indirectly from inmates of the Hudson County Jail in consideration of the granting to such inmates special treatment such as the use of the jail telephone facilities, special meals and sleeping quarters, and visiting privileges, *including but not limited to visits from prostitutes for immoral purposes.*

4. *At the time and place aforesaid, Henry B. McFarland, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:*

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

'Q. I show you what is marked as Grand Jury Exhibit 3, and ask you if you ever saw that person before?

A. Not to my knowledge.

Q. You never saw her at the prison, at Hudson County Jail?

A. Never seen her any place to my knowledge.

Q. Did you ever see her in the company of Israel Schawartzberg?

A. I did not. I just made the statement that I didn't see her at any time, to my knowledge.

Q. Well, I want to be clear. You don't recall seeing her, is that it?

A. I never seen her, to my knowledge. That's very clear.

* * * * *

Q. And you never saw Miss Frazer, who was in the Grand Jury Exhibit 3, did you?

A. Don't recognize her.

Q. Well perhaps there is another picture that might—? I am showing you Grand Jury Exhibit 5, which is a different picture of Miss Fraser, with glasses on. Perhaps you can look at it. Tell us whether you ever saw that person.

A. I don't recognize her.

Q. You know Miss Fraser?

A. I do not.

Q. Marilyn Jean Fraser?

A. Never heard the name previous to this newspaper article.

Q. And is it that you don't recognize the person depicted in these two photographs or you never saw that person before?

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

A. Never recall seeing that person before.

Q. You don't recall now seeing that person before, is that it?

A. Well, I am asked now.

Q. You can't say now whether you have ever seen that person before?

A. Not to my knowledge. I just made that statement."

5. The aforesaid testimony of Henry B. McFarland, the defendant, as he then and there well knew, was untrue, in that in fact he knew and recognized Marilyn Jean Fraser, had met her in the company of Israel Schwartzberg and permitted her to visit inmates at the Hudson County Jail for immoral purposes.

(Title 18, United States Code, Section 1621)

SECOND COUNT

The Grand Jury further charges:

6. The Grand Jury repeats and realleges paragraphs 1, 2 and 3 hereof, as though fully set forth herein.

7. At the time and place aforesaid, HENRY B. MCFARLAND, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

'Q. Are there any regulations concerning telephone calls by inmates?

A. Occasionally we do allow an inmate to make a telephone call. A judge will order it, a district attorney, a United States district attorney,—may request that an inmate be allowed to call him.

Q. Are those the only instances—

A. They are the only ones.'

Q. May I finish the question please? Are those the only instances when inmates are permitted to make telephone calls?

A. They are the only instances. I'll make a call for them, to notify their families that they've been placed in custody; I'll—

Q. That would be the initial call, when they've first received there?

A. That's it, sir.

Q. Otherwise they are not permitted to make telephone calls?

A. They're not.

Q. You'd know about it, wouldn't you, if there were telephone calls being permitted to inmates, aside from those you've mentioned?

A. I should know about it, unless someone does it while I'm not there.

Q. Aside from these instances, you yourself have not ever permitted inmates to make telephone calls?

A. Definitely, no.

Q. Then it would follow that you've never received money from inmates to make telephone calls?

A. If they didn't make telephone calls, no sir. I didn't receive them.

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

Q. Did you ever receive money from inmates for telephone calls?

A. No.'

8. The aforesaid testimony of HENRY B. MCFARLAND, the defendant, as he then and there well knew, was untrue, in that he permitted certain inmates extensive use of the jail telephone facilities and accepted money from inmates for the privilege of making telephone calls.

(Title 18, United States Code, Section 1621)

THIRD COUNT

The Grand Jury further charges:

9. The Grand Jury repeats and realleges paragraphs 1, 2 and 3 hereof as though fully set forth herein.

10. At the time and place aforesaid, HENRY B. MCFARLAND, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:

'Q. And, just a broad question now: was there ever any liquor permitted inmates in prison?

A. I never drank in my life, sir, I have never smoked a cigarette in my life. The answer is, No.

Q. Not to the inmates?

A. To anyone.

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

Q. And they weren't permitted to have women in the jail?

A. Positively not; only their families. We have a rule that only the members of their family and no teenagers are allowed to visit the jail.

* * * * *

Q. Did you accept money from any prisoners for special quarters and special meals?

A. Positively not.

Q. At no time?

A. At no time.

Q. And you didn't accept any money from prisoners for special favors?

A. Positively not.

Q. That goes for telephone calls too?

A. Telephone calls and other services that were extended from the jail.

Q. Did you ever permit other prisoners, (other than Harold Konigsberg) for a consideration, to have private meals, telephone calls and visits by females.

A. Positively not.

Q. Absolutely not?

A. Positively.

Q. Is that right?

A. Positively not.'

* * * * *

11. The aforesaid testimony of HENRY B. MCFARLAND, the defendant, as he then and there well knew, was untrue, in that he had in fact accepted money directly and indirectly

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

from inmates for special privileges, special quarters and meals *and extraordinary visiting privileges including visits by females other than members of their families and had permitted inmates to have liquor in the jail.*

(Title 18, United States Code, Section 1621)

FOURTH COUNT

The Grand Jury further charges:

12. The Grand Jury repeats and realleges paragraphs 1, 2 and 3 hereof, as though fully set forth herein.

13. At the time and place aforesaid, Henry B. McFarland, the defendant, duly appearing as a witness before the said Grand Jury and then and there being under oath as aforesaid, did unlawfully, wilfully and knowingly and contrary to said oath testify falsely before said Grand Jury with respect to material matters as follows:

'Q. So to sum it up then you have no knowledge of any prostitutes visiting Mr. Konigsberg while in your jail?

A. Positively not.

Q. And you have no knowledge of any prostitutes visiting any inmates in your jail?

A. That's right. I have no knowledge. I don't know the morals of the ones that visit. I don't check on them.'

Appendix 4—Text of the indictment (6a et seq.) showing, in italicized type, items dismissed or otherwise excluded from jury's consideration

14. The aforesaid testimony of Henry B. McFarland, the defendant, as he then and there well knew, was untrue in that he knew of and permitted visits by prostitutes to Harold Konigsberg and other inmates of the Hudson County Jail.

(Title 18, United States Code, Section 1621)''

APPENDIX 5

Statutes Involved

18 U.S.C. § 1621

§ 1621. PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. June 25, 1948, c. 645, 62 Stat. 733; Oct. 3, 1964, Pub.L. 88-619, § 1, 78 Stat. 995.

47 U.S.C. § 201

§ 201. SERVICE AND CHARGES

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable

thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II, § 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

Appendix 5

47 U.S.C. § 203

§ 203. SCHEDULES OF CHARGES; FILING WITH COMMISSION; CHANGES IN SCHEDULE; OVERCHARGES AND REBATES; PENALTY FOR VIOLATIONS

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may be regulations prescribe; but the Commission may, in its discretion

and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070.

Appendix 5

47 U.S.C. § 501

§ 501. GENERAL PENALTY

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, § 501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30.

APPENDIX 6

Excerpt from Petition For Rehearing In Court of Appeals (*Re* Government's Misconduct Relating to Witness Ruth Karsh)

III. THE PROSECUTOR'S CONDUCT AS TO THE PSYCHIATRIC HISTORY OF THE WITNESS RUTH KARSH.

Point III of our brief (pp. 66-69, with which see pp. 18-27) argued denial of fair trial by reason of the Government's conduct which prevented the Court and the defense from addressing themselves, *in advance of the direct testimony* of the witness Ruth Karsh, to the problem of that young lady's mental competence to testify. The prosecutor knew beforehand that Miss Karsh had suffered then recent psychiatric troubles of a most grave character, but he did not investigate the matter adequately himself before calling Miss Karsh to the stand, he took no step to inform the Trial Judge about it until after the conclusion of Miss Karsh's direct testimony and even then only by turning over to the Trial Judge an inconspicuous slip notation appended to one of the "3500" items, and he removed this single revelatory piece of paper from the "3500" documents before turning them over to defense counsel (which, again, was done only after conclusion of the direct examination, of course).

In this Court's opinion (slip op. 706-707), the prosecutor is criticized for this conduct, but it is held that the incident caused no harm to appellant. The Court states that we learned the facts in time to make full use of them on cross examination, that we got the essential information before the jury, that we did not ask for any further adjournment, and that we did not move to strike the witness's direct testimony on the ground of incompetence. The Court cites *Kyle* v. *United States*, 297 F. 2d 507, 513-514 (C.A. 2 1961),

which discusses in a general way the prosecutor's duty to make disclosures. The Court also notes that the fact that Miss Karsh had been a patient in a mental hospital did not render her incompetent as a matter of law, which we concede (and conceded in our brief, pp. 68-69).

However, except for its above noted statement that we did not move to strike the witness's direct testimony on the ground of incompetence, the Court's opinion does not seem to touch at all on what is by far the most important thrust of our contention in this branch of the case, namely, that the prosecutor's failure to make earlier disclosure absolutely deprived us and the Trial Judge of the opportunity to take up the question of Miss Karsh's competence before she took the stand and placed her extremely inflammatory testimony on the trial record. Counsel's technical failure to include in his voluminous motions at the end of the case a motion to strike Miss Karsh's testimony was undoubtedly a mistake, which counsel regrets. However, in the whole setting of the Karsh episode in this trial it really cannot be justly said that counsel in any meaningful way fell into any sort "waiver". A reading of our detailed recital of the relevant proceedings, at pp. 18-27 of our brief, shows how not only counsel but also the Trail Judge expressed repeated concern over the fact that the prosecutor's failure to make earlier disclosure had resulted in a *fait accompli* ineradicably lodging upon the record and in the jurors' minds the lurid and exceedingly harmful direct testimony of Miss Karsh. And in the concluding two sentences of the argument portion of our brief (p. 69) we called attention to the distinguished authority which favors the requirement of an anterior judicial finding as to mental competence before the witness is allowed to take the stand, all of which was hope-

lessly thwarted by the conduct of the prosecution in this case.

We respectfully and with all possible earnestness ask the Court to reconsider whether it may not well be that the Court gave insufficiently distinct attention to this point of ours that the Karsh episode hurt us not merely from the standpoint of opportunity for cross examination (which the Court apparently thought was a main part of our argument but which we in fact consider relatively unimportant), but above all from the standpoint of our anterior right or opportunity to have sought from the Trial Judge a ruling that Miss Karsh not be allowed to take the stand at all. And that such opportunity would most surely have been treated by the Trial Judge as a step of the gravest import for the fairness of this trial as a whole, can scarcely be doubted when, again, one reads our detailed factual recitals on this subject at pp. 18-27 of our brief, where it is shown that the Trial Judge repeatedly expressed intense distress and even indignation over the *fait accompli* consequences of the prosecutor's conduct in having brought it about that Miss Karsh's direct testimony was irrevocably planted in the jurors' minds.

In this entire picture, how much significance can justly be said to lie residually in our technical failure to have made a motion to strike Miss Karsh's direct testimony? It is a cliché that the striking of testimony in a jury trial is practically useless in situations of the vivid or melodramatic kind here involved. Neither reasoning drawn from formal doctrines of "waiver" nor, *a fortiori*, considerations of substantial justice, can justify any conclusion disadvantageous to the appellant in this situation, on account of the technical failure to make a motion to strike the direct testimony of Miss Karsh.

And since, as above emphasized, it is the direct testimony of Miss Karsh—and not her cross examination—which gives rise to our claim of error here, we respectfully ask the Court to give particular attention to our above suggestions as to the practical unimportance of our failure to make the motion to strike; for, again, it is solely this factor of the failure to make the motion to strike which the Court has adduced in its opinion as apparent justification for rejecting or disregarding our whole position concerning Miss Karsh's direct testimony in the light of the prosecutor's conduct.

There remains, finally, in connection with this issue of the prosecutor's conduct regarding Miss Karsh, the request of the Government for modification or withdrawal of the sentence in the Court's opinion where it is stated that the "Government's silence * * * was improper". The Government has made this request in the following letter to the Panel:

"UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Southern District of New York
United States Courthouse
Foley Square
New York, N. Y. 10007

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER
RMM:ctd

January 4, 1967

Hon. J. Edward Lumbard
Hon. Paul R. Hays
Hon. Wilfred Feinberg
United States Court House
Foley Square
New York, N. Y. 10007

Appendix 6

Re: United States v. Henry B. McFarland
Docket No. 30695

Dear Judges:

This Court on December 29, 1966 affirmed the Judgment of conviction in the above-captioned case. On the last page of the opinion (page 707) this Court stated, *inter alia*, with respect to the witness Ruth Karsh: 'Moreover, the Government's silence as to prior psychiatric history of the witness was improper, * * *'

At the trial below, following Miss Karsh's direct testimony, the Government turned over to the Trial Judge as part of the witness' Section 3500 material, a report which disclosed that the witness had been a patient at Mount Sinai Hospital as a result of certain psychiatric problems. This was the only material which the Government had in its possession regarding the witness' psychiatric history and the trial court initially sustained the Government's position that this section of the report should not be produced for defense counsel. As the cross-examination proceeded, the trial judge turned this portion over to defense counsel.

The Government therefore initially and properly disclosed to the trial court the only material it had in its possession regarding Karsh's mental history. However, this Court's statement that the 'Government's silence * * * was improper' can be read to suggest that the Government acted in a deceitful manner regarding this witness. In view of the undisputed facts set out above, we respectfully request that this sentence in the opinion be modified or withdrawn.

A copy of this letter is being sent to Maurice Edelbaum, Esq. counsel for Appellant.

Very respectfully yours,

/s/ ROBERT M. MORGENTHAU
Robert M. Morgenthau
United States Attorney"

Appendix 6

After receiving a copy of the above letter, we wrote, at his Honor Judge Feinberg's request, a reply, which was as follows:

" Law Offices
MAURICE EDELBAUM

250 Broadway
New York 7, N.Y.

—

REctor 2-1300

FREDERICK S. ABRAMS
PHILIP R. EDELBAUM

January 5, 1967

Hon. Wilfred Feinberg, Circuit Judge
United States Court of Appeals,
Second Circuit,
United States Courthouse,
Room 2004,
Foley Square,
New York, N.Y.

Re: UNITED STATES v. HENRY B. MCFARLAND
Docket No. 30695

My Dear Judge Feinberg:

This is written, at the request of Your Honor's office, in response to United States Attorney Morgenthau's letter dated January 4, 1967, concerning the statements in the Court's opinion, in this case, addressed to the prosecution's contention as to not having earlier disclosed the psychiatric information about the witness Ruth Karsh.

The gist of Mr. Morgenthau's letter appears to be that in having turned over to the Trial Judge, after Miss Karsh's direct testimony, '3500' materials

which included an item revealing that Miss Karsh had been a psychiatric hospital patient, the Government satisfied its obligation of proper and ethical disclosure.

I am respectfully obliged to call Your Honor's attention to the fact that this suggestion of the Government that it met its ethical and constitutional obligations, is not at all a new matter in the appellate presentation which the parties have made to this Court. This same item was discussed in detail, with references to the record, at Pages 24-25 of the brief for appellant in this Court, where he pointed out that the Government's supposed disclosure to the Trial Court of the '3500' document in question had evidently not even been brought meaningfully home to the mind of the Trial Court itself; and that the Government, evidently without calling attention thereto, had unilaterally, seen fit to delete the item from the '3500' materials *sub silentio*, as it were, before furnishing the '3500' materials to defense counsel, on the ground that the item 'was not relevant to her direct testimony'.

While we therefore respectfully take the position that neither the Government's contention at the trial nor Mr. Morgenthau's letter of January 4, 1967 are meritorious of any ameliorative action by this Court in the Government's favor, we must also respectfully advise Your Honor of the following:

The appellant is contemplating the filing of a petition for rehearing in this Court, with probably an application for rehearing *en banc*. Mr. Morgenthau's letter of January 4, 1967 presents questions which, it respectfully seems to us, cannot be resolved by any such post-haste exchange of mere letter-correspondence as is here occurring. We must respectfully reserve our right to the formal and duly demon-

strative process of the re-hearing procedure for proper and just disposition of the questions posed by Mr. Morgenthau's letter, along with the other questions which we may wish to present for re-hearing. In particular, may I respectfully call Your Honor's attention to the fact that neither the Court's opinion nor Mr. Morgenthau's letter, as we read the opinion and the letter, touch at all upon what was our essential contention in regard to the testimony of Miss Karsh, namely, that, had the Government made timely disclosure, there would have been an opportunity for the defense to move to prevent or exclude her taking the stand at all; that is to say, the issue is not merely one of the adequacy of our opportunity for cross-examination; the issue is as to the polluting of the trial proofs in the first instance by reason of the Government's having contrived to get Miss Karsh's direct testimony before the jury without giving the defense any chance at all to guard itself against what we can only say was an unjustified probative aggression by the Government.

May I respectfully repeat that we do reserve the right to 'litigate' this entire question further by a petition for re-hearing, which will, of course, be timely filed should we decide to request re-hearing.

Respectfully,

MAURICE EDELBAUM

ME:bcg

cc: Hon. Robert Morgenthau,
United States Attorney,
Southern District of New York."

The reference in our above quoted letter to pp. 24-25 of our brief is to a factual recital in which we described pro-

ceedings as to the prosecutor's having turned over to the Court but not to defense counsel, after Miss Karsh's direct examination, "3500" materials inconspicuously revealing (by way of a small separate document attached to another paper) that Miss Karsh had been in serious psychiatric trouble. We stated in our brief (p. 24), and the record confirms (*infra*), that although the prosecutor had not technically "concealed" this item from the Court (in the "disclosures" which were made for the first time after Miss Karsh's direct examination), the Court had evidently not had its attention drawn by the prosecutor to this inconspicuous but all-important item in a proper and adequate manner, the Court had evidently completely missed the item or at least its significance (in consequence of the prosecutor's method of "disclosure"), the defense had been deliberately deprived of the item by the prosecutor, the prosecutor's evidently altogether deliberate intentions in the matter were further revealed when upon being confronted with what he had done he said "the Government's position was that it was not relevant to her direct testimony", and not content with this astounding oversimplification he went on in his immediate next remarks to place on the record some scandalous and entirely unrelated observations about other "3500" items allegedly referring to the appellant. We are about to quote the pertinent colloquy, in which the circumstances just summarized appear; this portion of the colloquy occurred when the prosecutor was endeavoring to limit the defense use of the belated disclosure; it will be especially noted in the item now to be quoted that, although the Court acknowledged that the prosecutor had not literally "concealed" from the Court the tell-tale little slip of paper, the Court said of "that small exhibit which

was taken off the bottom of the statement", "I haven't seen it"; and that the Court further accused the prosecutor of having "clipped that from the exhibit which you indicated to the Court that you were handling for him [defense counsel] in toto"; we quote from pp. 600-601 of the trial testimony:

> "The Court: I think you are taking the precaution a little late, Mr. Fanning. Any precaution you should have taken with regard to this young lady that you produced as a witness on this stand and examined on direct examination and had difficulty in bringing forth certain matters and had to refresh her recollection several times, don't you think you are bringing this matter to the attention of the Court at a little late date? Don't you think so?
>
> Mr. Fanning: I don't think so, your Honor, but I might say this because Mr. Edelbaum has made the statement on the record that I have attempted to conceal the fact of this woman's treatment—
>
> The Court: Mr. Fanning, what was that small exhibit which was taken off the bottom of the statement? What did it disclose? I haven't seen it.
>
> Mr. Fanning: It disclosed that she had been treated psychiatrically in Mount Sinai Hospital.
>
> The Court: And you clipped that from the exhibit which you indicated to the Court that you were handing to him in toto?
>
> Mr. Fanning: That was handed up to the Court and the Court saw that portion of the statement.
>
> The Court: He didn't see what part you had excised. It was on the part I examined, but it was not on the part that was given to Mr. Edelbaum.
>
> Mr. Edelbaum: Do I understand now, your Honor, that this man had the temerity to conceal from the Court what was contained in the paper?

The Court: No, he did not conceal it from the Court.

Mr. Edelbaum: But concealed it from me.

Mr. Fanning: I asked the Court to excise that portion—

Mr. Edelbaum: So I wouldn't know.

Mr. Fanning: Since the government's position was that it was not relevant to her direct testimony."

It is in the face of the above quoted record facts as to the circumstances of the "disclosure" made for the first time only after Miss Karsh's direct examination—i.e., again, it being undisputed that the whole situation had been kept concealed from both the Trial Judge and the defense until the fat was in the fire thanks to the completion of the direct examination—it is in the face of these facts, we say, that the Government is now asking the Court to absolve it of impropriety. We respectfully think that the Government not only should be absolved but that in having sent its above quoted letter-request it betrays so disturbing a renewed and indeed intensified attitude of insensitivity concerning its responsibilities, that this Court should grant rehearing for the purpose of reevaluating the seriousness of the Government's misconduct and should now re-read the scales, on this issue, for we urge that it is now clearer than before that there should be a reversal of the conviction on this ground alone. True, it is not the business of an individual appellant seeking relief from a judgment of criminal conviction on the ground of prosecutive misconduct, to preach to the Court (or even to the prosecutor) that unless prosecutors are admonished strongly enough for misconduct they will not behave in the future, or that the only effective admonishment that

such prosecutors may take to heart is in the form of that ultimate appellate admonition, reversal of the judgment of conviction. Nevertheless, at the risk of unseemly intrusion into this Court's own policy province, we do ask the Court to consider that where a Governmental prosecutive office is bearing itself in so unregenerate and almost defiant a manner notwithstanding a stern admonitory expression by the Court, and where the record so unequivocally bids the Government to hold its tongue, but where the Government nevertheless clamors back at the admonishing Court, there seems to be no other effective way of finally bringing the Government to account, and to a sense of its past misdeed and future obligation, than by teaching such Government spokesmen the only lesson they can apparently understand, reversal of judgment.

We respectfully consider this matter of the Government's misconduct, and of its apparent unabashedness pointing to incorrigibility in the circumstances here presented, to be of that overriding degree of importance which would justify resort to the extraordinary processes of this Courts *en banc* rehearing procedures, in the event that the Panel should consider the matter unfavorably to our contention or should deem it wise to call upon the voice of the entire Bench to declare the solemn result which we here pray, as being the only result that can do effective justice in this case and can effectively serve the interests of Federal criminal justice generally in the Southern District of New York."

BRIEF IN OPPOSI-
TION TO PETITION
FOR A WRIT OF
CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1200

HENRY B. McFARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1–8) is reported at 371 F. 2d 701.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. A petition for rehearing was denied on January 26, 1967. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to March 27, 1967, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the testimony on which petitioner's prosecution for perjury before a grand jury was

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founded was properly held to be material to the grand jury's investigation.

2. Whether, in the circumstances, government counsel's failure to inquire fully into the mental competency of a government witness deprived petitioner of a fair trial.

STATEMENT

After a trial by jury, petitioner was convicted in the United States District Court for the Southern District of New York on two counts of perjury (counts 2 and 3; A. 9a–12a [1]) in violation of 18 U.S.C. 1621. On June 22, 1966, he was sentenced to imprisonment for six months on count 2, and to a suspended sentence of one year and six months on count 3; he was also placed on probation for a commensurate period of time consecutive to the sentence on count 2. The court of appeals affirmed the conviction (Pet. App. A 1–8; 371 F. 2d 701).

The evidence against petitioner (the sufficiency of which petitioner has not challenged, either here or in the court below) may be briefly summarized. In January 1965, a federal grand jury in the Southern District of New York was investigating possible violations of the Mann Act and Federal Communications Act with respect to the transportation of prostitutes from that district to the Hudson County Jail, Jersey City, New Jersey, and the use of the telephone in furtherance of that activity (Tr. 1144–1148). Petitioner, warden of the Hudson County Jail since 1951,

[1] References are to the original transcript of trial ("Tr.") and to the Government's appendix ("G.") and Appellant's appendix ("A.") in the court below, all of which are on file with the Clerk of this Court.

appeared before the grand jury on January 26, 1965, and was placed under oath (Tr. 1146). He was warned of his rights and of his liability for prosecution for perjury should his testimony be wilfully false (Tr. 1154–1156). Among other questions, petitioner was asked (1) if he knew one Marilyn Jean Fraser (Tr. 1172–1173, 1184–1186); (2) if he permitted inmates, in return for money, to make telephone calls other than notification to their families that they were in custody (Tr. 1176–1177); (3) if he permitted inmates, in return for money, to have favors, such as special meals, special quarters, and visits from women (Tr. 1178, 1186); and (4) if he permitted prostitutes to visit one Harold Konigsberg and other inmates (Tr. 1182). Petitioner answered each question in the negative. Subsequently the grand jury returned a four count indictment charging perjury with respect to his answers (Pet. App. A12–A20).

At the perjury trial, Milton Pollack, who was incarcerated in the Hudson County Jail from March to June 1962, testified that he received various favors from petitioner in the nature of comfortable quarters (including television, hospital bed, hot plate and refrigerator) (Tr. 638–639), telephone privileges (approximately twice a day) (Tr. 643–645), business trips outside of the prison (Tr. 683–692), and visits from prostitutes in petitioner's office (Tr. 713–720). In return for these special favors, Pollack paid petitioner with theater tickets (Tr. 681–683), luggage (Tr. 688–689), $300 in travelers' checks (Tr. 691–699),

and more than $2,000 in personal checks (Tr. 648–678, 708).[2]

Jack Fitzpatrick, who was in the jail in late 1962 and early 1963, was allowed private visits with a Mrs. Janet Taccetta after making $10 payments to petitioner (Tr. 110–126, 163–166). Harold Ross, who was in the jail from October 1963 to August 1964, was moved to more commodious quarters in consideration for $50 paid to petitioner (Tr. 227–231). In these quarters, Ross regularly received male and female friends, as well as members of his family. His guests played cards, watched television, and ate with him. Ross and the other inmates in the same quarters also had the privilege of having guards obtain food for them outside of the prison (Tr. 240–244, 372–374). During a five month period, he was allowed to place 174 toll calls from the prison telephone (Tr. 244–245, 247–252). For his special treatment, Ross paid petitioner approximately $25 per week (Tr. 237, 246, 254–255).

Other prisoners testified to similar treatment and privileges in return for payments to petitioner (*e.g.*, Tr. 18–19, 171–180, 205, 213, 401–412, 527–547).[3]

ARGUMENT

Reduced to essentials, the petition presents two issues (compare Pet. 2–6): (1) whether petitioner's wilful false testimony to the grand jury concerned

[2] We note that the trial judge discounted witness Pollack's credibility in commenting briefly to the jury on his testimony (A. 40a).

[3] The facts with respect to the second issue are set forth *infra*, pp. 6–8.

a matter "material" to its investigation, within the meaning of the perjury statute (18 U.S.C. 1631), and (2) whether petitioner was deprived of a fair trial because the government failed, in advance of the testimony of one of its witnesses, to investigate fully into the witness's history of mental problems. Neither issue warrants review in this Court.

1. Before submission of the case to the jury, counts 1 and 4 of the indictment were dismissed (Tr. 1343; 1757–1758) for insufficiency of proof under the "two witness" rule (see, *e.g., Arena* v. *United States,* 226 F. 2d 227 (C.A. 9), certiorari denied, 350 U.S. 954). Also, a portion of count 3 (italicized at Pet. App. A18) was excised, because the form of one of the grand jury's questions on which the count was based assumed facts not proved (Tr. 1761–1763; 1767). Premising his argument on the characterization of the instant case as one concerning "Mann Act perjury" (Pet. 16), petitioner apparently contends that, inasmuch as references to violations of the Mann Act were deleted from the perjury case as submitted to the jury, no federal crime was committed. The contention is wholly without substance. Petitioner was not indicted for "Mann Act perjury"; indeed, as the court below noted "there is no such concept" (371 F. 2d at 704). Petitioner's crime was that of wilfully giving false testimony under oath as to a material matter before a competent tribunal. 18 U.S.C. 1621. There can be no doubt that the federal grand jury was legally competent to investigate into possible Mann Act and Federal Communications Act viola-

tions[4] involving the Southern District of New York. The questions asked of petitioner (incorporated in counts 2 and 3) sought information concerning unusual telephone privileges (A. 9a–10a; 12a) and special favors such as the availability of liquor (A. 11a) and permission to have women visitors (A. 11a), and were material to the grand jury's investigation, whether or not a Mann Act offense was ultimately proved or charged; it is of course clear that the test of materiality is "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation * * *" *Carroll* v. *United States*, 16 F. 2d 951, 953 (C.A. 2); *accord, e.g., United States* v. *Marchisio*, 344 F. 2d 653, 665 (C.A. 2). There can be no doubt that the questions and false answers here were material in that the natural effect of petitioner's denials was to impede the grand jury's investigation. And, as the court below pointed out (371 F. 2d at 703), the offense is committed before the grand jury and materiality is determined as of the time when the false answers are given; materiality does not become "washed out" (Pet. 25; see also Pet. 16–24) of the case at some later time.

2. On direct examination, a government witness, Ruth Karsh, testified that on several occasions she

[4] Petitioner contends (Pet. 25–35) that a conviction under 47 U.S.C. 203 and 501, would be unconstitutional. This question, however, is not reached here, since, as we show, the questions petitioner falsely answered were material to the grand jury's investigation into Mann Act violations. Moreover, petitioner's lengthy argument on this point ignores the teachings of the *Dennis* case, see *Dennis* v. *United States*, 384 U.S. 855, 867.

was allowed, after making payments to petitioner, to visit one of the inmates in the Hudson County Jail (Tr. 532–533, 536–538, 545–546). At the conclusion of the direct testimony, government counsel gave the entire F.B.I. report (relating to interviews with Miss Karsh) to the court. The portions of the report which the government believed to be properly producible under 18 U.S.C. 3500 were circled with red crayon. A copy of the report, to the extent government counsel believed to be producible, was turned over to petitioner (G. 2). Uncircled on the report submitted to the court, and therefore absent from the copy furnished to petitioner, was a paragraph relating to Miss Karsh's treatment at Mount Sinai Hospital (G. 6). During the course of cross-examination, petitioner elicited the fact of the prior institutionalization, and then asked for information with respect to the witness's mental history. The court *sua sponte* called for and examined the hospital and medical records, and turned the information over to the defense.

The records showed that, after her mother's death in 1961, the witness sought medical assistance at the psychiatric division of Mount Sinai Hospital, where she was treated for three months in 1961, and two weeks in April-May 1965. She was also treated at the Manhattan State Hospital from May to September 1965 (Tr. 573, 580–583), having been discharged from Manhattan in her own custody on September 17, 1965, nearly eight months before she testified below, after a staff conference found that she had "no abnormal mental trends" (Tr. 593–594).

For three months prior to trial Miss Karsh had held a steady job as a printer, and she was maintaining her own apartment in Brooklyn (Tr. 571–572). Before producing her as a witness, government counsel (who had not examined the medical records beforehand) satisfied himself, through personal interviews, that "she was in all respects competent to testify, intelligent and able to fully recollect, observe and narrate" (G. 3). The trial court found no error in having permitted the witness to testify on direct examination, but allowed great latitude to the defense on cross-examination.

In these circumstances, there is no merit to petitioner's allegations of concealment and non-disclosure as a predicate for error. Although the court below found the prosecutor's calling of the witness, without having made full inquiry into her mental background and disclosure of it to the court, to have been "ill-advised," neither it nor the trial court considered that the government had been deceitful (G. 5; Pet. App. A 9–10). Moreover, the court below properly ruled that petitioner had not been prejudiced by the government's action; it observed (371 F. 2d at 704–705)—

> Defense counsel eventually learned all the facts of the witness's history in time to make full use of it on cross-examination, did get before the jury the essential information affecting her credibility, did not ask for any further adjournment, and did not move to strike the witness's direct testimony on the ground of incompetence.

The witness's testimony was competent and lucid at all times. Her credibility was an issue for the jury.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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